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IN THE

Supreme Court of the United States

No. 506

OCTOBER TERM, 1956

IN RE: GEORGE E. ADDISON, *Appellant.*

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of Pennsylvania entered on April 16, 1956, re-hearing denied April 30, 1956, reconsideration denied September 20, 1956, reversing the decision of the Court of Common Pleas No. 4, Philadelphia County, and reinstating the decision of the Civil Service Commission, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is reported in 385 Pa. 48. The opinion of the Court of Common Pleas No. 4 in the case of *Philadelphia Civil Service Commission v. Connolly*, which was made part of the decision in the instant case by the Court of Common Pleas No. 4, is reported in 1 District & County (2d) 399. The opinion of the Court of Common Pleas in the instant case is unreported. A copy of the opinion of the Civil Service Commission is printed in Appendix A.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on April 16, 1956. A re-hearing was denied on April 30, 1956. A petition for reconsideration was denied on September 20, 1956. Notice of appeal was filed in that court on July 30, 1956. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 U.S.C., Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment by appeal in this case: *Fiske v. State of Kansas*, 274 U.S. 380 (1927), and *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921).

QUESTIONS PRESENTED BY THE APPEAL

The following questions are presented by this appeal:

1. Is the Philadelphia Home Rule Charter valid and constitutional in restricting the jurisdiction and power of the Court of Common Pleas in respect to appeals thereto from the Civil Service Commission since the court is not a municipal instrumentality but is created by an Act of the State Legislature?

The Supreme Court of Pennsylvania held the Philadelphia Home Rule Charter an Act of the Legislature and valid and constitutional.

2. Is the Act of September 29, 1951, P. L. 1654, 53 PS §304, providing for appeals from the decisions of Civil Service Boards and Commissions to the Court of Common Pleas or the County Court of the county in which the city is located by any employee aggrieved thereby within 30 days of the decision applicable to employees of the City of Philadelphia or was it repealed by the provision of Section 7-201 of the Philadelphia Home Rule Charter (approved by the electorate on April 17, 1951, but not effective until the first Monday of January, 1952) which provides that

findings and decisions of the Civil Service Commission are final and no further appeal on the merits is available, but that an appeal could be made to the courts on jurisdictional or procedural grounds only?

The Supreme Court of Pennsylvania held that the Philadelphia Home Rule Charter properly limited the scope of appellate review to the extent provided by Section 7-201 of the Charter and that the Act of 1951 did not supersede this provision of the Home Rule Charter.

3. Is not the denial of court review on the merits in connection with the dismissal of the appellant, a police officer, which was ordered on the basis of acts which occurred prior to the effective date of the Philadelphia Home Rule Charter, when the appellant, if dismissed, would have had the right to court review of the dismissal, a denial of due process of law, since it gives retroactive effect to the Home Rule Charter?

4. Does not the denial of court review on the merits of appellant's dismissal from the police force impair the contractual obligation between the appellant and the city in contravention to Article I, Section 10-1 of the Constitution of the United States which prohibits an "ex post facto law, or law impairing the obligation of contracts"?

5. Does not the advice given by an assistant district attorney to the appellant prior to the hearing before the Civil Service Commission that the appellant had no constitutional right to refuse to make any statement to the assistant district attorney and appellant's superior officers, and also the improper advice given to the appellant by the legal member of the Civil Service Commission that, while the appellant had the right to refuse to testify on the ground that the answers to any questions would tend to incriminate him, his refusal to so testify would result in his immediate dismissal, constitute a denial of constitutional rights to the appellant by responsible public officials to such an extent as to amount to unlawful pressure and

threats of summary dismissal on the mere claim of the privilege of the self-incrimination clause of the Fifth Amendment, contrary to the decision of the Supreme Court of the United States in *Slochower v. Board of Education of the City of New York*, 350 U. S. 551, 100 Supreme Court (L. Ed.) 449, which held that the refusal to testify did not constitute an admission of guilt, and a summary dismissal of an employee because of his claim of the privilege was a violation of due process of law?

STATEMENT OF THE CASE

1. The Facts

The appellant, a police officer of the City of Philadelphia, was dismissed by the Commissioner of the Police for conduct unbecoming an officer in that he borrowed money from Leo "Clee" Coleman, a known numbers banker, to purchase his home, securing the loan by a mortgage thereon. His appeal to the Civil Service Commission was dismissed. On appeal to the Court of Common Pleas, the appeal was sustained. The City of Philadelphia appealed to the Supreme Court of Pennsylvania, which reversed the Court of Common Pleas and reinstated the order of the Civil Service Commission dismissing the appeal.

2. How the Federal Questions Are Presented

The Court of Common Pleas of Philadelphia County was created by the Act of April 14, 1834, P. L. 333, which provides as follows:

> "There shall be holden and kept, in every of the counties of this commonwealth, a court of record, the name and style whereof shall be 'the court of common pleas of the (respective) county'."

Its jurisdiction is set forth specifically in the Act of June 16, 1836, P. L. 784, Section 13, which provides:

"The court of common pleas for the said city and county shall, besides the powers and jurisdiction aforesaid, have the power and jurisdiction of courts of chancery, so far as relates to:

I. The supervision and control of partnerships, and corporations other than municipal corporations.

II. The care of trust moneys and property, and other moneys and property made liable to the control of the said courts.

III. The discovery of facts material to a just determination of issues, and other questions arising or depending in the said courts.

IV. The determination of rights to property or money claimed by two or more persons in the hands or possession of a person claiming no right of property therein.

V. The prevention or restraint of the commission or continuance of acts contrary to law and prejudicial to the interests of the community or the rights of individuals.

VI. The affording specific relief, when a recovery in damages would be an inadequate remedy."

By the Act of September 29, 1951, P. L. 1654, 53 PS §304, it was provided that:

"All decisions of the Civil Service Board or Commission in any city shall be subject to appeal to the Court of Common Pleas or the County Court of the county in which the city is located."

The City of Philadelphia contended that Section 7-201 of the Philadelphia Home Rule Charter, which provided:

"Findings and decisions of the Commission and any action taken in conformance therewith as a result thereof, shall be final and there shall be no further appeal on the merits, but there may be an appeal to the courts on jurisdictional or procedural grounds",

superseded the Act of 1951 and therefore the appellant could not appeal from the decision of the Civil Service Commission to the Court of Common Pleas. The Court of Common Pleas held that the limitation upon the scope of court review of a decision of the Philadelphia Civil Service Commission was unconstitutional, since it interfered with the powers of a state constituted court by a municipality and since also it impaired the obligation of a contract between the appellant and the City of Philadelphia, contrary to both the federal and state constitutions. The Supreme Court of Pennsylvania declared that Section 7-201 of the Charter was constitutional but it did not pass upon the question of the impairment of the obligation of the contract set forth in the opinion of the Court of Common Pleas. The Court of Common Pleas also raised the question of the retroactive character of Section 7-201 of the Home Rule Charter which denied to the appellant the right of judicial review on the merits at the time of the commission of the alleged acts which led to the dismissal of the appellant. This, in fact, deprived the appellant of due process of law. The Supreme Court of Pennsylvania did not pass upon this point in its decision.

The record discloses that the appellant, prior to his dismissal, was interrogated by an assistant district attorney and two superior officers concerning the charges brought against him and that the appellant was advised by the assistant district attorney that he had no constitutional right to refuse to make any statement to the assistant district attorney and his superior officers. (Appendix, p. 69) As a result of this advice, appellant, who was without counsel at that time, made a statement. This statement was introduced in evidence at the time of the hearing before the Civil Service Commission. At the hearing before the Civil Service Commission, the appellant was advised by the Law Member of the Civil Service Commission that while he had the right to refuse to testify on the ground that the answers to any questions would tend to incriminate

him, his refusal to so testify would result in his immediate dismissal. The following appears from the record:

"GEORGE E. ADDISON, 1340 N. Marvine St., being duly sworn, was examined and testified as follows:

By MR. SCHOFIELD: Mr. Commissioners, we think this is an irregular proceeding. We do not think this is a proper presentation of the case by the City Solicitor and the District Attorney. We do not think that they can make up their case by calling as a witness the person who has been discharged and who has appealed. We think it is incumbent upon the 'prosecution', so to speak, referring to the District Attorney and the City Solicitor, to make out a case. Apparently here the question is who made this mortgage, and we think that that is a matter readily susceptible to proof from witnesses other than the defendant himself.

By MR. MESIROV: Mr. Schofield, this is not a criminal proceeding; it is a civil proceeding. I suppose the best evidence as to who made the mortgage is derivable from the man who made it. I don't think your position is correct, and I especially call your attention to a provision of the rule that provides that, even if an employee claims the privilege against self-incrimination, when being interrogated in connection with his job, the claiming of that privilege is good cause for discharge. I hardly see how you can say that the City cannot develop this charge by interrogating the employee.

By MR. SCHOFIELD: I don't believe it applies to an adverse proceeding before the Civil Service Commission. I think, if this Commission has an employee before it, and asks a question and he refuses to answer it, he could be discharged by the Commission, but where this man has already been discharged by the municipal authorities—

By MR. MESIROV: Mr. Schofield, he has no privilege.

By MR. SCHOFIELD: In the first place, I differ with you. He has the privilege of refusing to testify under the

Fifth Amendment, if he wants to take advantage of it. I have not advised him to take advantage of it, and he is not now claiming it.

By MR. MESIROV: He has not asserted that privilege. The mere fact that he is discharged is the only information we have before us at the moment. Why shouldn't he answer the questions put to him?

By MR. SCHOFIELD: Because I think it is incumbent upon the City to establish a case without him. They have the burden.

By MR. MESIROV: They have the burden, but I would like to see what they could do without calling the appellant. I take it, Mr. Schofield, you have on several occasions established, in civil matters, cases for your client on the testimony of the opposite party.

By MR. SCHOFIELD: If you are talking about an ordinary civil suit, where you call the opposite party for cross examination, that's a different thing.

By MR. MESIROV: This is it.

By MR. KATZ: May I alleviate the technical point that Major Schofield has suddenly thought of. I am willing to withdraw George Addison from the stand, and offer in place of his testimony statements elicited from this George Addison, which are part of the record—"

* * * * *

By MR. ETTINGER to Mr. Katz:

Q. Mr. Katz, I show you the notes of testimony that were taken at Philadelphia, Pa., November 4, 1953, at the Flint Building, 219 N. Broad St., Philadelphia, Pa., commencing at 10:15 A.M. and it is noted that there were present Leon Katz, Esq., Assistant District Attorney, Albert E. DuBois, Chief Inspector, CID, Philadelphia Police Department, James Maxwell, Deputy Inspector, CID, Philadelphia Police Department, and I ask you to identify Pages 1 to 28, inclusive, of these notes of testimony.

By MR. SCHOFIELD: Identify them in what way?

A. In the way I think proper. On ages 1, 2 and including Page 28 of this volume RR, are contained notes of testimony elicited from George Addison, whom I see sitting in court here today, and who I understand is one of the appellants. They reflect questioning by me concerning an alleged mortgage transaction, of which records have already been offered in evidence."—

By MR. SCHOFIELD: Objected to. These are at most unverified statements; I haven't even read them yet. I don't know the real purpose of it except as a broad outline, made not under oath by the appellant in this case. I think that there should be definite evidence of the facts in the case, other than statements made in the way of answers and interrogations put to him by three of his superior officers, or two and the Assistant District Attorney, I think the whole thing is irrelevant, except as corroboration, unless they weigh the facts."

* * * * * *

By MR. SCHOFIELD: May I call the Commission's attention, as far as I have gotten—Page 2, he is being told there by a prosecutor of the City and County of Philadelphia, telling him that he doesn't have to testify, and then telling him he has no constitutional rights, and he can't stand on his constitutional rights. You as Commissioners know that Mr. Katz had no right to say that to him. Coming as it did from Mr. Katz, it put the witness under a misapprehension. He had a perfect right. Mr. Katz can't deny constitutional rights to any citizen.

By MR. KATZ: Where is that statement, Major?

By MR. CUNNINGHAM: Is there a statement on the part of the witness that he is willing to answer anything?

By MR. SCHOFIELD: It makes no difference if you tell a man that the Constitution doesn't give a man any

rights. Your question to me was whether he said he was willing to answer.

By MR. CUNNINGHAM: I was not questioning your contention on that subject.

By MR. SCHOFIELD: On the top of Page 2.

By MR. CUNNINGHAM: That is merely academic. This man was absolutely willing to answer anything.

By MR. SCHOFIELD: He might have been, but he was not answering anything until he was first told erroneously that he had no constitutional rights.

By MR. MESIROV: We well reserve ruling on this transcript. Mr. Addison, take the stand, please.

By MR. SCHOFIELD: Now you are doing the very thing that I objected to.

By MR. ETTINGER: If the Commission please, Mr. Schofield made a great to-do about the fact that the man was discharged. He had not been discharged, and had no choice but to give testimony.

By MR. MESIROV: He could have refused.

By MR. ETTINGER: And then he would have been fired for that reason.

By MR. MESIROV: He had a choice.

By MR. ETTINGER: But the choice was to be fired. I want that clear." ———

* * * * *

"By MR. SCHOFIELD: I want to object to it. So that we will not be playing a game, I object to all further questions along this line. Here sits a District Attorney who has rested his case.

By MR. ETTINGER: Coleman has been arrested and convicted.

By MR. SCHOFIELD: I don't know whether they arrested Lowry. There have been other arrests growing out of this. I can't make you ask questions of this man that may walk him into jail.

By MR. MESIROV: Let him plead his constitutional rights.

By MR. SCHOFIELD: You have no right to ask him these questions unless you first advise him of his rights, and even then I question the propriety of asking questions of the witness.

By MR. MESIROV: I had assumed that you would protect his rights. If I am wrong in that assumption, I will add my advice to Mr. Addison, that if you feel or believe that the reply to any question put to you by me or anyone else, would tend to incriminate you, you have a constitutional right to refuse to answer. However, I think I must add to that that it is the view of this Commission with respect to appellants that, if they do exercise that privilege, we dismiss the appeals by applying, either directly or by analogy, the provision of the Charter which denies the right to employment by the City of those who fail to make full and frank disclosure, even though they have a constitutional right not to do so. I think that fairly states both your constitutional right and our position. If it does not, I am sure Mr. Schofield can amplify it.

By MR. SCHOFIELD: I don't agree with you, if you mean to say that the Commission has a right to consider the failure to testify because of the constitutional provision, by a person who has already been discharged from the City service, and whose appeal is now pending before your Commission. I think what you have in mind refers to where an employ of the City is being questioned by the Civil Service Commission.

By MR. MESIROV: No, Mr. Schofield. I realize that there is a possible argument, but I don't agree with you.

We do make an exception under these circumstances, and that is where somebody is under indictment, or has been arrested for a crime; we will continue the hearing dates pending conclusion of the criminal proceedings; they in turn waiving any right to back pay for the period of continuance. So that we try to protect these people to the extent we can in their constitutional right. But we add that we do not think that, by the time the criminal proceeding is disposed of, there will be any longer any constitutional right to assert: they either will have been convicted or acquitted of the crime the answer to which might incriminate them.

By MR. ETTINGER: There were ten officers discharged. One of them withdrew his appeal. Seven of them have been already heard. Nobody has been indicted by this Commission.

By MR. SCHOFIELD: That has nothing to do with it. This is a surprise to us today. We did not dream that the prosecution—if I may call it that—was going to put the records in and then rest, and subsequently call our man to the stand."

* * * * *

Subsequently, apparently under the pressure of the remarks of the legal member of the Commission with the threat to discharge appellant forthwith and the then prevailing opinion that a charter provision providing that a refusal of a city employee on the ground that the answers would tend to incriminate him was valid, appellant's counsel permitted appellant to testify. The hearing took place on June 10, 1954. The appeals were argued before the *Slochower* decision was rendered. The *Slochower* decision came down April 9, 1956, and the decision in the instant case was rendered on April 16, 1956. Presumably, because of the prevailing legal opinion above set forth, the issue was not raised in the appeal until it was made

part of the petition to reconsider filed in the Supreme Court of Pennsylvania by new counsel.

3. The Federal Questions Are Substantial

In the instant case, the Act of September 29, 1951 gave the Court of Common Pleas jurisdiction of appeals from decisions of Civil Service Boards and Commissions. Since the right of appeal was unrestricted, of necessity it meant an appeal on the merits as well as on jurisdictional grounds. No municipal charter can over-ride a specific act of the legislature of statewide application (Act of April 21, 1949, P. L. 665, Art. II, Sec. 18) (Appendix p. 75), particularly where it affects the jurisdiction of the Courts of Common Pleas, which are state courts. No provision of a charter can be inconsistent with the Constitution of the United States. This restriction is specifically set forth in the Act of April 21, 1949, P.L. 665, Article II, Section 17 (Appendix p. 75).

The Home Rule Charter is not legislation in the technical sense, although approved by the electorate pursuant to legislative grant. While having the force of law as applied to municipal affairs, it cannot usurp the statutory authority granted to the Courts of Common Pleas. The holding of the Supreme Court of Pennsylvania that the Home Rule Charter is legislation and constitutional deprived appellant of due process of law in a constitutionally created state court of record, contrary to the 14th Amendment of the Constitution of the United States.

For the sake of argument, assuming that an appeal to the Court of Common Pleas is of a restrictive character, a reasonable interpretation would be that the decision of the Civil Service Commission must be based upon reasonable, substantial and probative evidence, the usual rule prevailing in appeals from findings and conclusions by administrative agencies. It would also mean that no decision of the Civil Service Commission could be arbitrary or capricious and that a fair hearing would be accorded

to persons appearing before the Commission. This rule is so fundamental that no citation of authorities need be cited. This is exactly what the Court of Common Pleas did in the instant case. It found that the decision of the Civil Service Commission was not based on substantive proof, but on suspicion only.

A police officer, in a sense, has certain vested rights in his employment, although he may not have a constitutional right to be a policeman. It, therefore, follows that the appellant should have his rights protected in any action involving an arbitrary and capricious dismissal, by requiring that he be accorded due process of law in any hearing afforded him.

It cannot be denied that the appellant had a contract of employment with the City of Philadelphia, although not in written form. Any arbitrary and capricious action which results in the dismissal of the appellant without due process of law impairs the obligation of that contract. This was discussed by Judge Davis, of the Court of Common Pleas, in his opinion in the case of *Philadelphia Civil Service Commission v. Connolly*, supra, which was made part of the Court's decision in the instant case. His view is supported by the decision in *Ludwig v. Board of Education of City School District of Cincinnati*, 72 Ohio App. 437, 52 N. E. 2d 765, where the Court says (page 767):

> "The Court is of the opinion the Legislature did not intend that the Common Pleas Court be substituted for the Board of Education, but rather sought to place around the teacher's enjoying the privilege of continuing contract, the right to have reviewed the action of the Board, . . . The Court is of the opinion that the purpose of the statute was to give the teacher enjoying a continuing contract with the Board of Education protection against termination of his contract by caprice or as a result of any other emotion that sometimes actuates men, unsupported by facts."

Judge Davis additionally called attention to the retroactive character of Section 7-201 of the Philadelphia Home Rule Charter as applied to the facts in the instant case. The acts alleged to form the basis for the dismissal occurred on or about August 4, 1950. The appellant was dismissed on March 26, 1954, three and one-half years later. While mere retroactivity is not sufficient to invalidate a statute, retroactive statutes are subject to constitutional limitations, such as Article I, Section 10 of the United States Constitution which provides that no state shall pass any bill in attainder, ex post facto law or law impairing the obligation of contract. The 14th Amendment provides that no state shall deprive any person of life, liberty without due process of law (Sutherland on Statutory Construction, page 118, Section 2204). Applied to the facts in the instant case, Section 7-201 cannot hurdle this constitutional limitation.

Although the Supreme Court of Pennsylvania made no reference in its opinion to the question of the impairment of the obligation of the contract in question, the necessary consequence of its decision was to give effect to Section 7-201 of the Home Rule Charter. This created a federal question. *Mobile, etc. R. Co. v. Tennessee*, 153 U. S. 486, 14 S. Ct. 968, 38 L. Ed. 793.

Section 10-110 of the Philadelphia Home Rule Charter provides:

> "Refusal to Testify. If any officer or employee of the City shall wilfully refuse or fail to appear before any court, or before the Council or any committee thereof, or before any officer, department, board, commission or body authorized to conduct any hearing or inquiry, or having appeared, shall refuse to testify or to answer any question relating to the affairs or government of the City or the conduct of any City officer or employee on the ground that his testimony or answers would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any matter

about which he may be asked to testify before such court or at any such hearing or inquiry, he shall forfeit his office or position, and shall not be eligible thereafter for appointment to any position in the City service."

This provision is similar to Section 903 of the New York City Charter which was the subject matter involved in the decision of *Slochower v. Board of Education of the City of New York*, supra. In the *Slochower* case, a University Professor was summarily dismissed from his teaching position by reason of his refusal to testify before a Congressional committee on the ground that his answers would tend to incriminate him. This was pursuant to the provision of Section 903 of the New York City Charter above referred to. This action was condemned by the Supreme Court which said (pages 454-455):

"At the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment. The right of an accused person to refuse to testify, which had been in England merely a rule of evidence, was so important to our forefathers that they raised it to the dignity of a constitutional enactment, and it has been recognized as 'one of the most valuable prerogatives of the citizen.' Brown v. Walker, 161 US 591, 610, 40 L ed 819, 825, 16 S Ct 644. We have reaffirmed our faith in this principle recently in Quinn v United States, 349 US 155, 99 L ed 964, 75 S Ct 668. In Ullmann v United States —— US ——, 100 L ed Advance P 361), 76 S Ct ——, decided last month, we scored the assumption that those who claim this privilege are either criminals or perjurers. The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. As we pointed out in

Ullmann, a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances. See Griswold, The Fifth Amendment Today (1955). "With this in mind, we consider the application of 903. As interpreted and applied by the state courts it operates to discharge every city employee who invokes the Fifth Amendment. In practical effect the questions asked are taken as confessed and made the basis of the discharge. No consideration is given to such factors as the subject matter of the questions, remoteness of the period to which they are directed, or justification for exercise of the privilege. It matters not whether the plea resulted from mistake, inadvertence or legal advice conscientiously given, whether wisely or unwisely. The heavy hand of the statute falls alike on all who exercise their constituitional privilege, the full enjoyment of which every person is entitled to receive. Such action falls squarely within the prohibition of Wieman v Updegraff, 344 US 183, 97 L ed 216, 73 S Ct 215, supra. . . .

"Since no inference of guilt was possible from the claim before the federal committee, the discharge falls of its own weight as wholly without support. There has not been the 'protection of the individual from arbitrary action' which Mr. Justice Cardozo characterized as the very essence of due process. Ohio Bell Tel. Co. v. Public Utilities Com., 301 US 292, 302, 81 L ed 1093, 1100, 57 S Ct 724."

While it is true that the city has a right to inquire into the fitness of its personnel, it cannot deny to any employee the right to plead the privilege under the 5th Amendment of the United States Constitution. Since this right was denied to the appellant, as the record indicates, the appellant was not accorded due process of law. The

appellant had a perfect right to remain silent under the protection of the self-incrimination clause of the 5th Amendment. However, he was advised by the assistant district attorney in the presence of appellant's superior officers that the appellant had no constitutional right not to give a statement or to testify, and the law member of the Civil Service Commission advised the appellant that if he did refuse to testimy on the ground of the self-incrimination clause of the 5th Amendment, his appeal would be dismissed forthwith. The advice of both the assistant district attorney and the Civil Service Commissioner was improper and deprived appellant of due process of law.

The decision in the instant case is of special importance because it involves the interpretion of a charter provision similar to that involved in the *Slochower* case. The *Slochower* case disapproved of the sinister meaning attached to the plea of the self-incrimination clause of the 5th Amendment. The instant case should serve as a caution and a warning to civil authorities everywhere to refrain from improperly advising persons appearing before them that they have no constitutional right not to testify or to make a statement and that they cannot claim the privilege of the self-incrimination clause of the 5th Amendment of the Constitution of the United States except at their peril.

It is, therefore, respectfully submitted that the appellant properly invokes the appellate jurisdiction of this Honorable Court.

Respectfully submitted,

J. J. KILIMNIK,
Attorney for Appellant.

Appendix "A"

(Copies of Opinions, Judgments, Petitions and Orders below)

OPINION OF CIVIL SERVICE COMMISSION

This appeal was taken from the dismissal of the appellant on March 26, 1954, pursuant to a Notice of Intention to Dismiss dated March 16, 1954, from his position as Policeman, the assigned cause being:

"CONDUCT UNBECOMING AN OFFICER:

Specification 1.

In that you purchased premises, 1340 N. Mervine Street, Philadelphia, Pa., on August 4, 1950, the entire purchase price for which was furnished to you by Leo "Clee" Coleman, a well known numbers banker, who took a mortgage in return."

At the hearing before this Commission held on June 10, 1954 at 2:00 p.m. in Room 625 City Hall, evidence was presented which showed that one George Addison and Dorothy Addison, his wife, purchased the premises 1340 North Marvine Street (correct spelling), Philadelphia on August 4, 1950 for the sum of $2500 and on the same day a mortgage was recorded in the same amount, in which the mortgagor was George Addison and Dorothy Addison, his wife, and the mortgagee was Leo Coleman. The recorded mortgage was for a term of ten years, with interest at 4 per cent per annum, with monthly installments of principal and interest amounting to $25.32 each.

The appellant was identified as the purchaser of the premises 1340 North Marvine Street, with his wife Dorothy, and also as the mortgagor of the same premises, also with his wife Dorothy. The appellant testified that he had

spoken to Mr. Abe Johnson, a real estate man, with offices at 1312 West Columbia Avenue, about obtaining funds to purchase his home as the premises were about to be sold at a Sheriff's sale. Mr. Johnson looked at his place and told him he thought he could get the funds for him, if he didn't bid over $2500 at the sale. The appellant then went to the sale, bid the property in for $2500, paid $250 down and so reported to Mr. Johnson who instructed him to have his lawyer prepare the necessary papers, which he did. Settlement was made on August 4, 1950 with Mr. Addison's attorney, Saul Lipschutz, Esq., taking care of securing the funds and completing the necessary details. The appellant testified he had no idea who put up the money for the property and took the mortgage until about a year and a half later when he learned it was Leo Coleman, otherwise known as Clee Coleman, whom he knew to be a numbers banker.

The appellant testified that at the time of the transaction he had been a member of the police force for nine years, six months and was assigned to patrol car 125, covering the sector from Jefferson Street to Norris Street and from 5th Street to Broad Street. Included in this area was the headquarters of Leo (Clee) Coleman, located at 1632 North 13th Street, although the appellant denied any knowledge of this. During the four years appellant was assigned to this sector he never turned in a vice report regarding Clee Coleman nor had he ever suspected any wrong doing at Coleman's headquarters. During his entire tour of duty in the 12th Police District covering a period of over seven years, he made only one lottery arrest and claimed he had never heard of Leo Coleman, although he stated he had heard of Clee Coleman, the numbers banker, but had never connected the two names. Appellant stated he had made his mortgage payments to Mr. Johnson's office for about a year, when the mortgage was assigned to Mr. Baylinson's office at 1420 Walnut Street and later to Mr. Blumberg's office at 2815 Wharton Street. The appellant admitted that when he discovered the identity of his mort-

gagee about a year and a half after the settlement had taken place that he had taken no action.

At the request of appellant's counsel the case was continued until August 19, 1954 at which time the testimony of Saul Lipshutz was taken. Mr. Lipshutz' memory of the details of the transaction, however, was so poor that little, if any, light was shed on where or how the appellant received the funds at the settlement.

It seems clear to this Commission that a member of the Philadelphia police force charged with enforcement of the law in the 12th Police District who accepts a $2500 loan from a well-known numbers banker operating in the district is guilty, if not of dishonesty, of gross stupidity. As we have repeatedly stated in our opinions, members of our police force must be above suspicion and it is certainly incumbent upon all Policemen to be extra careful of accepting loans, particularly such generous loans as in this instance.

We are quite frankly not impressed with the appellant's avowal that he did not notice the name of the mortgagee when he signed the mortgage papers. If appellant had acted as a conscientious police officer should have acted, he would have inquired as to the identity of the party who was granting him such a generous loan and would have satisfied himself that his benefactor was not someone who would hope to profit from the transaction. Especially he should have satisfied himself that the man who was loaning him $2500 was not a notorious racketeer who was only too happy to do a favor for a police officer charged with law enforcement in the area in which he was operating.

We decide, therefore, that the Police Commissioner had just cause for his action. We, therefore, sustain the dismissal and we so certify to the Personnel Director.

SIDNEY B. DEXTER
E. LUTHER CUNNINGHAM
LEON I. MESIROV

September 14, 1954

OPINION

November 10, 1955 JOHN MORGAN DAVIS, *J.*

George E. Addison was dismissed from his employment as a patrolman in the Bureau of Police of Philadelphia by the Commissioner of Police on March 26, 1954. The cause of his dismissal was conduct unbecoming an officer in that he had borrowed money from Leo "Clee" Coleman, a known numbers banker, to purchase his home, securing the loan by a mortgage thereon.

After his appeal to the Civil Service Commission was denied by the Commission, he appealed to this court. We sustained his appeal and herein state our reasons.

As in the *Appeal of Patrick J. Donahue* from the Civil Service Commission to this court, as of December Term, 1954, No. 9693, wherein we have this day filed our opinion, two questions are involved: one a legal question, the other a factual question. The legal question is the same and has been passed upon by this court in *Civil Service Commission v. Connolly*, 1 D. & C. 2d, 399, and *Appeal of Herman S. Tuckman*, C. P. No. 4, June Term, 1954, No. 2712, as well as in the aforesaid companion case hereto, *Appeal of Patrick J. Donahue, supra.* It is the question whether this court has appellate jurisdiction on the merits as well as on jurisdictional and procedural questions in appeals from the Civil Service Commission. We concluded in those cases, and do so again herein for the reasons therein stated, that this court does have such appellate jurisdiction.

The factual question is whether Addison's conduct was unbecoming an officer.

He, together with his family, had rented and had occupied modest rooms at 1340 North Marvine Street since 1944. In 1950 the premises were exposed to sheriff's sale and Addison, desirous of retaining it as a dwelling for himself, his wife and three children, consulted a neighborhood real estate broker to ascertain how large a mortgage

could be obtained if he purchased the property. He was advised by the broker that he could secure a mortgage of $2500 on that property. Thereafter, on July 3, 1950, together with his attorney, he attended the sheriff's sale and successfully bid in the property for $2500, depositing the required ten per cent, or $250, on account thereof. He advised the broker of his purchase and need for the mortgage. The broker instructed him to have his counsel communicate with him and obtain the necessary information for the preparation of a mortgage for $2500. This was done. A sheriff's deed for the property to Addison and his wife was executed on July 24, 1950, and recorded on August 1, 1950. A mortgage was executed by Addison and his wife to one Leo Coleman, payable in monthly installments within ten years. All arrangements for these transactions were made for Addison by his lawyer, a member of the Philadelphia Bar.

Addison and his wife signed the mortgage at their home, on the third page thereof. On the fourth page, or back of the mortgage, there had been placed by rubber stamp an unsigned certificate that Leo Coleman, the mortgagee, resided at 1632 North 13th Street. When it was affixed and by whom did not appear. Addison testified that it was not there when he and his wife signed the mortgage. One of the commissioners expressed the opinion that the record failed to show when the certificate was put on the mortgage or that Addison knew that it was there.

Fore one year, Addison paid the monthly installments of principal and interest at the office of the broker who had placed the mortgage for him. (See Appellant Exhibit No. 2.) On August 2, 1951, the mortgage was assigned to Frank Shore, and Addison made future payments at the office of counsel for the assignee of the mortgage. (See Appellant Exhibit No. 3.) On January 24, 1952, the mortgage was assigned to Jacob Blumberg, et al., and thereafter Addison paid the monthly installments at the office of the agent for the latter. (See Appellant Exhibit No. 4.)

A person known as Clee Coleman gained notoriety as a numbers banker and ultimately was convicted and imprisoned for offenses committed. How notorious and how well known he was in 1950, when the conduct of Addison, now under scrutiny, occurred, is not so clear. In any event, Addison testified that he did not learn until a year and a half after the mortgage was placed that Leo Coleman, the original mortgagee, was one and the same Clee Coleman, the notorious numbers banker, and, because the mortgage had previously been assigned, he then did nothing about it, but continued making payments to the attorney for the assignee.

Addison was corroborated in his testimony by Abe Johnson, the real estate broker, and Saul W. Lipshutz, Esquire, Addison's counsel. Mr. Johnson testified that he invested probably $80,000 for Coleman and serviced his mortgages.

Addison was discharged for purchasing his home entirely with monies furnished him by Leo "Clee" Coleman, the well known numbers banker.

We have sustained his appeal for failure of proof of the essential element of the specification, viz., that Addison knowingly borrowed money from Leo Coleman, the notorious numbers banker.

We have difficulty concluding from the record without gross speculation, that Addison received mortgage money form a person personally known to him at all, much less known to him to be a notorious numbers banker.

The following factors militate against appellant's knowledge thereof. He pursued normal legitimate channels to purchase and pay for his home. He inquired of the real estate broker, Abe Johnson, whom he had known for years as a neighborhood realtor, as to the value and the amount of mortgage money he might anticipate obtaining. He engaged an attorney who bid, prepared the deed and mortgage, procured the actual funds, and handled the matter

for him. Thereafter he paid monthly installments thereon to the agents of the mortgagee and subsequent assignees.

To purchase the property was his unquestionable right. To mortgage the property likewise was his right. To mortgage the property to a person named Leo Coleman was his right. Only to knowingly do so to Leo "Clee' Coleman, the numbers banker, was not his right.

There is no evidence in the record from which any responsible fact finding tribunal can conclude that Addison knew at the time that he executed the mortgage who the actual lender of the money was, much less that he knew him to be Clee Coleman, the numbers banker. See *Gartland v. City of Philadelphia*, 70 D. & C. 161.

Suspicion was aroused by the fact that the amount of the mortgage equalled the bid to the sheriff. It would have been easy and better to have offered testimony from a qualified realtor that such a mortgage was inordinately large for the premises in question and not indicated as being warranted by its market value, *if that was the case.*

Further suspicion was indulged in from the fact that Addison made only one numbers arrest in the several years while on duty in the area where Clee Coleman lived. How many arrests should have he have made? How many arrests did others make? Both facts were susceptible of proof, if relevant, and not proven.

We had occasion to review the kind of substantial proof necessary in the *Connolly* case, supra. Suspicion is not enough.

We have reviewed the record carefully and conclude that the Civil Service Commission acted on suspicion and not on substantive proof, for which reason we have sustained the appeal.

J.

C. P. No. 4, September Term, 1952, No. 6673

PHILADELPHIA CIVIL SERVICE COMMISSION

v.

WILLIAM J. CONNOLLY

OPINION

November 25, 1953. JOHN MORGAN DAVIS, *J.*

William J. Connolly, a patrolman with the Department of Police, City of Philadelphia, was dismissed by the Police Commissioner on May 12, 1952, for allegedly receiving a suit of clothing as a gift from a known gambler.

After his appeal to the Civil Service Commission was denied by the Commission, he appealed to this court.

The power of this court to review the merits of the case has been questioned by the City of Philadelphia. It contends that the adjudication of the Commission is final and that there can be no appeal on the merits, pointing out that the Philadelphia Home Rule Charter provides in Section 7-201 that:

> "Findings and decisions of the Commission and any action taken in conformance therewith as a result thereof, shall be final and there shall be no further appeal on the merits, but there may be an appeal to the courts on jurisdictional or procedural grounds."

Defendant basically relies on the Act of September 29, 1951, P.L. 1654, 53 P.S. 304 to establish that this court may review the merits of the cause. This act, inter alia, provides:

> "All decisions of the civil service board or commission in any city shall be subject to appeal to the court of common pleas or the county court of the county in which the city is located."

Should we determine this act pertains to the decisions of the Philadelphia Civil Service Commission, then this court must review the case on its merits. In the absence of any limitation as to the scope of the appeal provided for therein, the act must be construed to encompass the Commission's decision in its entirety.

The Statutory Construction Act of 1937, May 28 P.L. 1019 Art. IV, Sec. 58 (7); 46 P.S. 558 (7), provides:

> "All provisions of a law of the classes hereafter enumerated shall be strictly construed: . . . (7) Provisions decreasing the jurisdiction of a court of record;
>
> All other provisions of a law shall be liberally construed to effect their objects and to promote justice."

Perhaps oversimplified, the first question presented is which is controlling: Section 7-201 of the Home Rule Charter or the Act of September 29, 1951, P.L. 1654, 53 P.S. 304.

The City argues that the Home Rule Charter section is controlling firstly, because it is of a later effective date than the Act of September 29, 1951, even though it was adopted before the latter act, and secondly, because it deals with a matter of strictly municipal concern.

The question whether the Charter or the Act of Assembly is controlling was raised before in *Civil Service Commission v. Wilson*, 373 Pa. 583, but was not decided and therefore to that extent this is a case of first impression. However, the Supreme Court in the Wilson case did decide that the issue was not whether the Commission's decision's were appealable but rather the extent or scope thereof. Quoting from page 586, of Chief Justice Stern's opinion:

> "It is obvious that, on appeals from the Civil Service Commission, Courts of Common Pleas in Philadelphia are invested, both under the Charter and the

> Act of Assembly, with some measure of review, since under either they may inquire into the jurisdiction of the Commission and the regularity of the proceedings there conducted. It is true that under the statute the appeal is apparently on somewhat broader lines, which would permit the determination of the question as to whether there was any evidence to support the Commission's findings. The question therefore is not whether the Courts of Common Pleas of Philadelphia have jurisdiction of appeals from the Civil Service Commission, but what is the *extent or scope* of their authority to review the Commission's findings."

Significantly in that case the extent and scope of the appeal exercised by the court in fact included the merits of the case without limitation. Otherwise it could not have concluded as it did at page 587:

> ". . . the dismissal of Wilson's appeal by the court below must be affirmed even if the Act of Assembly were to be held controlling, for there was obviously *sufficient testimony* to justify the action of the Police Commissioner in dismissing Wilson as well as the decision of the Civil Service Commission affirming that dismissal." (Emphasis supplied.)

We have reviewed the proceedings before the Commission and since there is *insufficient* testimony to justify the dismissal of defendant Connolly it becomes necessary to determine the question heretofore undecided, i.e., whether our appellate power is limited only to questions of jurisdiction and procedure.

It is to be observed that it would indeed be frustrating if a court of common pleas, in its appellate jurisdiction over the Civil Service Commission, could only sustain dismissals where proper and could not reverse dismissals where improper.

The City contends that the Home Rule Charter section supersedes the Act of September 29, 1951[1], because its effective date was declared to be January 7, 1952, notwithstanding the fact that it was adopted April 17, 1951, by the voters of Philadelphia. Neither *Locke's Appeal*, 72 Pa. 491, nor *Belovsky v. Redevelopment Authority*, 357 Pa. 329, cited by the City, rules on the question as of when a statute speaks. *Farmers National Bank and Trust Company of Reading v. Berks County Real Estate Company et al.*, 333 Pa. 390, does hold that "as a general rule a statute speaks as of the time when it takes effect and not as of the time it was passed." The Statutory Construction Act, May 28, 1937, P.L. 1019, Art. 1, Sec. 4, as amended, 46 P.S. Sec. 504, provides that laws "enacted finally *at a regular session of the Legislature* shall be in full force and effect from and after the first day of September next following their final enactment, unless a different date is specified in the law itself or if enacted finally after the first day of September of the year of the regular session * * * the same shall become effective immediately upon final enactment." (Emphasis supplied.)

Whatever else the Home Rule Charter is, it is not a law finally enacted at a regular session of the Legislature. Therefore, whether it supersedes the Act of September 29, 1951, which was enacted at a regular session of the Legislature, is not determined by its effective date.

The Home Rule Charter provisions, within the limitations of the First Class City Home Rule Act of 1949, April 21, P.L. 665, Sec. 21, 53 P.S. 3421, supersede all acts affecting the organization, government and powers of such city. These limitations include, among others, the following:

1. That the powers exercised be consistent with the constitutions of the United States and of the Commonwealth. Section 17.

2. That the powers exercised be in relation to its municipal functions. Section 17.

3. That the provisions of the Charter be consistent with specific restrictions, limitations and regulations prescribed in the Act, one of which is that no city shall exercise powers granted by Acts of the General Assembly which are applicable to all of the cities of the Commonwealth, Section 18(c).

To the extent that Section 7-201 of the Charter, denying appeal on the merits from decisions of the Commission, offends any of the foregoing limitations, it does not supersede the Act of September 29, 1951 which grants appeals on the merits from decisions of the Commission.

It should be borne in mind that the conflict between the Charter provision and the Act encompasses only the power of the courts of common pleas of Philadelphia to review the Commission's actions on their merits. It has not been questioned that the court has the power to review the Commission's proceedings in other respects, and as heretofore pointed out, the Supreme Court has so decided. *Civil Service Commission v. Wilson*, supra.

By this Home Rule Charter provision (Section 7-201) the City of Philadelphia would proscribe the jurisdiction and power of this court. Nothing is more fundamental nor firmly established than that the courts of common pleas are not municipal agencies and that their actions are not municipal functions, either in whole or in part. It seems unnecessary to point out that the courts derive their powers from the Constitution and the Legislature of the Commonwealth. Article 5, Section 26, of the Constitution provides in part:

> "All laws relating to courts shall be general and of uniform operation, and the organization, jurisdiction and powers of all courts of the same class or grade, so far as regulated by law, and the force and effect of the process and judgments of such courts, shall be uniform: . . ."

The courts' powers are granted and taken away by the Legislature and may not be limited in any way by the

City of Philadelphia. To delegate to the City the power to either add to or detract from the jurisdiction of the several courts of common pleas would be a most unlawful delegation of legislative authority. The Legislature cannot abdicate, transfer or delegate its constitutional authority or duty. *Holgate Bros. Co. et al. v. Bashore et al.*, 331 Pa. 255, 259, 260.

The Legislature could have limited the courts' appellate power as it did by the Act of May 20, 1937, P.L. 728, which was reviewed in *Kaufman Construction Co. v. Holcomb et al.*, 357 Pa. 514. (See also the many cases cited in footnote 2 thereto, at page 518.) But neither City Council nor the electorate in adopting the Philadelphia Home Rule City Charter could so limit the courts' power. The Legislature did not limit the courts' appellate powers but specifically granted the appellate power herein under review by its Act of September 29, 1951, supra. In the light thereof, it is Socratic argument to say that since the Legislature passed the Home Rule Act, supra, it thereby authorized the curtailment of Acts of Assembly applicable to the courts of common pleas. The Home Rule Act, supra, limited the Charter provisions specifically to municipal functions in Section 17 thereof.

The state judiciary performs no municipal function. The fact that the territorial jurisdiction of the state court is contiguous with the City's boundaries does not change the situation. Would anyone suggest that the City could supplant the Public Utilities Commission by attempting to regulate public transportation facilities within its boundaries and justify such an attempt by the powers granted in the Home Rule Act, supra? To ask the question is to answer it.

Even if there were no constitutional question and no municipal function question, it seems that the Act of September 29, 1951, supra, would enable defendant to appeal on the merits by reason of its state-wide applicability.

Section 18(c) of the Home Rule Act, supra, specifically provides that Charter provisions shall not supersede "acts applicable to all the cities of the Commonwealth". The City argues that the Charter provision in question is of municipal concern only, not of state-wide concern, and therefore not violative of Section 18 of the Home Rule Act, citing *Lennox et al. v. Clark, et al.*, 372 Pa. 355.

The Supreme Court decided *Civil Service Commission v. Wilson*, supra, after the *Lennox v. Clark* case, and did not decide in the Wilson case that the question herein under consideration is of municipal concern only. Further, the Act of September 29, 1951, confers jurisdiction as to appeals from decesions of civil service boards or commissions on a state-wide basis, and therefore affects the Civil Service Commission of Philadelphia equally with the commissions or boards of other cities in Pennsylvania. The standards of hiring, firing and performance are in no way either prescribed or imposed upon the Commission by the Act in question. The Charter specifically provides in Section 7-303 that "Any dismissal or demotion . . . shall be for just cause only." As the Act of September 29, 1951, applies to Philadelphia, neither the Commission nor defendant is held to a different standard imposed by the Legislature from that prescribed in the Charter. The City, without interference from the Legislature, can set its own standards of performance and administer its own offices. Reviewing its actions is different from proscribing its actions. The latter might offend the principle of *Lennox v. Clark*, supra; the former does not.

There is a further compelling reason why we must review this matter on its merits, although the parties did not address themselves to it. A significant fact should be considered: defendant was dismissed from the service for an act which allegedly occurred on February 27, 1948. At that time he was under civil service as now. At that time neither the Home Rule Act nor the City Charter thereunder had been adopted. At that time he was as responsible

as now for the consequences of his act. Yet if he had been discharged then instead of now, his discharge would have been reviewable by the court. See *Gartland v. City of Philadelphia*, 70 D. & C. 161, 1950. To deny him the right of review because his discharge is effected years later, after a new charter is adopted, is to give retroactive effect to both the Home Rule Act and the City Charter. Neither Act provides for such retroactive application. Legislation which affects rights will not be construed to be retroactive unless it is declared so in the Act itself. *Kunze v. Duquesne City*, 126 Pa. Superior Ct. 43. We find no declaration in the subject legislation giving it retroactive effect to any extent.

Since defendant had the right before the enactment of the Charter to a review on the merits, even if limited to a determination whether there was substantial evidence to sustain the Commission's action and no abuse of discretion by it (*Gartland v. City of Philadelphia*, supra), to deny him such a right at this time is to give retroactive effect to the Charter provision in question, viz., section 7-201.

Our Supreme Court has held:

> "The law of the case at the time when it became complete is an inherent element in it, and if changed or annulled, justice is denied, and the due course of law violated." *Kay v. Pennsylvania Railroad Co.*, 65 Pa. 269, 277; quoted with approval in *Rebel v. Standard Sanitary Mfg. Co.*, 340 Pa. 313, at page 319. See also *Com. ex rel. Kelly v. Brown*, 327 Pa. 136, 142; and *Menges v. Dentler*, 33 Pa. 495, 498 cited therein.

While defendant has no proprietary interest by reason of his employment, he does have contract rights and obligations thereunder. By depriving him thereof, the obligation of contract is impaired in contravention of both the federal and state constitutions.

In *Beaver Co. B. & L. v. Winowich*, 323 Pa. 483, the Supreme Court stated at page 492 et seq.:

"Few clauses of the federal constitution have been the subject of more interpretation by the Supreme Court of the United States than that which forbids a state from impairing the obligation of contracts. At first there was confusion arising from a somewhat shadowy distinction between the contract itself and the remedies to enforce it (see *W. B. Worthen Co. v. Kavanaugh*, 295 U. S. 56, 60), but the decisions have gradually clarified this difficulty, so that the governing principles are now reasonably well defined. Stating them in broad outline to the extent to which they are pertinent, they may be summarized as follows:

"1. Any law which enlarges, abridges, or in any manner changes the intention of the parties as evidenced by their contract, imposing conditions not expressed therein or dispensing with the performance of those which are a part of it, impairs its obligation, whether the law affects the validity, construction, duration, or enforcement of the contract: *Story's Commentaries on the Constitution*, Book 3 ch. 34, sec. 1379.

* * * * *

"5. The remedy, or means of enforcing a contract, is a part of its obligation which the constitution protects. The legislature has the power to formulate, alter and suspend modes of procedure, even as to pre-existing contracts, provided that, under the guise of a procedural statute, it does not deprive a party of any substantial right under the contract: *Breitenbach v. Bush*, 44 Pa. 313, 318, 320; *Penrose v. Erie Canal Co.*, 56 Pa. 46, 48; *West Arch Building & Loan Association v. Nichols*, 303 Pa. 434. Any change in procedure which does not supply an alternative remedy, equally adequate and efficacious, in place of that which existed when the contract was made, is violative of the constitutional prohibition. The ideas of right and remedy are inseparable: *Green v. Biddle*, 8 Wheat. 1, 17;

Walker v. Whitehead, 16 Wall. 314, 317; *Edwards v. Kearzey*, 96 U. S. 595, 600; *McGahey v. Virginia*, 135 U. S. 662, 693; *Barnitz v. Beverly*, 163 U. S. 118, 127; *Oshkosh Waterworks Co. v. Oshkosh*, 187 U. S. 437, 439."

If by Section 7-201 of the Charter, procedure alone were changed and not substantive rights, it still would be violative of defendant's rights for the remedy is entirely taken away.

A procedural change abolishing a remedy defendant had when the conduct under scrutiny occurred, viz., February 27, 1948, is an impairment of the contract of employment and prohibited. See *Kunze v. Duquesne City*, supra.

For the foregoing reasons, the Commission's decision denying defendant's appeal from his discharge by the Police Commissioner is appealable to this court on its merits as well as on jurisdictional and procedural grounds, Section 7-201 of the Charter to the contrary notwithstanding.

Since we must review the case on its merits, a recitation of the facts is in order. Those facts simply stated are as follows:

Defendant, William J. Connolly, became a member of the Philadelphia Police Department on February 14, 1942, and was a member of the Department continuously thereafter until May 12, 1952, when he was discharged by Police Commissioner Thomas J. Gibbons. While so employed, until November 30, 1949, he was assigned to the Vice Squad under Captain Ellis. He was never subjected to disciplinary action and was the recipient of four commendations for performance of duty during his years of service. On May 12, 1952, Police Commissioner Gibbons dismissed defendant from his employment as a patrolman in the Police Department, charging him with conduct unbecoming an officer. The specification averred that defendant "received gifts of wearing apparel from one George Tickner, a well known gambler, totalling $75.00, on Feb-

ruary 27, 1948 . . ." The dismissal was on the advice of a special trial board set up by the Police Commissioner because he "wanted to be fair". Apparently the "trial board" acted on a summary of facts furnished the Police Commissioner by the District Attorney. That summary pertained to other officers as well as defendant and the aofresaid "trial board" recommended that all twelve men concerned be separated from the service. The Police Commissioner followed its recommendation. (Notes of Testimony, Civil Service Commission, pages 17 et seq.).

The hearing before the "trial board" consisted of a member thereof informing defendant that a grand jury report mentioned him as having received gifts of the value of $75.00 from one George Tickner and that he was brought there for any explanation he cared to make. Defendant denied receipt of the alleged gift and refused to make any further statement without counsel.

On appeal, the two lay members of the Civil Service Commission conducted the hearing. The law member was not then present, and although he was present at a rehearing, he did not participate in the final denial of the appeal.

The testimony adduced at the hearings before the Commission was as follows: A file clerk employed at the Diamond & Co. store, subsequent to the alleged purchase, testified concerning the store's records. She stated that Commissioner Gibbons and a William Carmody examined the store records, selected certain sales slips and ledger cards and photostatted them. The witness denied any knowledge concerning the transaction in question. She stated that sales slips were neither made nor signed by the customer, but rather by certain employees. She further testified that store records through March 1948 were destroyed.

William Carmody, a special investigator, testified that he saw a sales slip number 0100 reflecting a sale of a $75.00 grey suit in February 1948 to William J. Connolly, of 2058 Susquehanna Avenue, Philadelphia, on the corner of which

was written "Charge George Tickner". He testified that a charge ledger card for George Tickner contained among other entries a charge of $75.00 for a grey suit with the name Wm. Connoly. He declined to explain a further similar entry for a $115.00 suit to a person bearing a name similar to his, L. Carmody. He testified further that although he did not inquire of the salesman, he concluded from the identity of name and address that defendant purchased a suit and charged it to George Tickner. It is to be noted that the spelling of defendant's last name, Connolly, differs from the spelling of the name entered on Exhibit 1 as "Connoly", the man who allegedly purchased the grey suit.

Commissioner Gibbons testified that on the recommendation of the District Attorney's office and a trial board he set up, he discharged defendant.

Defendant testified that he was on the police force since February 14, 1942, is married and the father of a son and a daughter; that he was never disciplined and has received four citations. He testified that until November 30, 1949, he was a member of the Vice Squad under Captain Craig Ellis. He denied making any purchase at Diamond & Co., ever being in the store, ever, including February 27, 1948, getting a grey suit there, ever receiving a gift from George Tickner, or authorizing anyone to buy anything or receive presents for him. When asked for an explanation of his name appearing on the sales slip and ledger card, he stated: "I have thought of many things since before the Grand Jury. The only thing that I can believe and think myself, is that someone else may have used my name and address to purchase something."

At a rehearing Clarence J. Ferguson, Lieutenant of Detectives, testified that defendant was under his command from March 1942 to November 1949, and was an excellent policeman. Sergeant Charles E. J. meehan was not permitted to testify as to defendant's character.

Morris Oxman testified that he was practically sales manager of Diamond & Co. during 1948; that he never saw defendant before, never sold him a suit of clothes; recalled selling several persons named Connolly in 1948 including William Connolly, a former Chief of County Detectives, but that he never sold defendant anything; that he was interrogated three or four times by the investigator as to whether he sold a suit to a William Connolly and charged it to Tickner, but he denied it and could not identify defendant Connolly.

The Commission considered the dismissal presumptively legal and the burden to prove otherwise on the defendant. It declined to substitute its judgment for the judgment of the Police Commissioner in administering the affairs of his department, and questioned the necessity of the Police Commissioner to prove acceptance of the gift beyond doubt. It considered the dismissal just, and denied the appeal.

Thereafter at a rehearing, although the Commission cited the Annotations of the new City Charter for Section 7-201, to the effect that "fairness to the employee and to the City requires that all facts . . . be presented . . .", it heard but declined to consider the testimony of the salesman as negating the sale in question.

Although the Legislature has clearly manifested its intent that decisions of the Civil Service Commission be reviewed, it has not delineated the scope or the nature of that review. We must construe the statute as best we can in the light of general principles, analogous statutory provisions, the factors inherent in the situation and practical common sense. It seems clear that since the Legislature has gone so far as to specifically provide for an appeal by any employee aggrieved by any civil service board or commission it could not have meant such an appeal to be worthless or illusory. Such a result would necessarily follow from an interpretation of the statute requiring the courts to affirm the Commission's findings no matter how unwar-

ranted or how insubstantial the evidence is upon which those findings are based. For the Legislature to have created a remedy, which in reality is nothing more than a rubber stamp, is in effect to have created no remedy at all. This interpretation seems not only to be erroneous but impossible. It is fundamental under our system of jurisprudence that the jury is the sole judge of fact, and yet we have provisions for correcting a jury when their action is not warranted by the evidence in the case. The sweeping power to make decisions unsupported by evidence, being so contrary to our ingrained traditions, should not be implied. Having concluded that the decision of the Commission must be based on some evidence, it must next be decided how much evidence is required to sustain a finding.

Chief Justice Stern in *Civil Service Commission v. Wilson*, supra, in referring to the scope of the appeal under the Act of September 29, 1951, at page 586, states:

> "It is true that under the statute the appeal provided is apparently on somewhat broader lines, which would permit the determination of the question as to whether there was *any evidence* to support the Commission's findings." (Emphasis supplied.)

The Chief Justice went on further to state at page 587:

> ". . . in any event, the dismissal of Wilson's appeal by the court below must be affirmed even if the Act of Assembly were to be held controlling, for there was obviously *sufficient* testimony to justify the action of the Police Commissioner in dismissing Wilson as well as the decision of the Civil Service Commission affirming that dismissal." (Emphasis supplied.)

In attempting to ascertain the intent of the Legislature without a specific expression of the statute as to the scope of review, it would appear quite proper to examine

how the Legislature has provided for the review of the decisions of the administrative agencies of the state.

> "The court to which the appeal is taken shall hear the appeal without a jury on the record certified by the agency. After hearing, the court shall affirm the adjudication unless it shall find that the same is in violation of the constitutional rights of the appellant, or is not in accordance with law, or that the provisions of sections thirty-one to thirty-five inclusive of this act have been violated in the proceeding before the agency, or that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence. If the adjudication is not affirmed, the court may set aside or modify it, in whole, or in part, or may remand the proceeding to the agency for further disposition in accordance with the order of the court." Sec. 44 of the Administrative Agency Law, June 4, 1945, P. L. 1388, 71 P.S. 1710.44.

Thus the Legislature in providing for review from decisions of the many and varied agencies of the Commonwealth has said that findings of fact must be supported by *substantial evidence* and the court on appeal shall determine whether they are so supported. There is no reason for a lesser degree of scrutiny when reviewing civil service boards or commissions.

It may be noted that where the Legislature intends that Appellate review of an administrative agency shall be limited it will specifically so provide. See *Posten Taxi Co. v. Pennsylvania Public Utility Commission*, 164 Pa. Superior Ct. 13, 17. Act of May 28, 1937, P. L. 1053 Sec. 1107 as amended 66 P.S. Sec. 1437. *Lyons Transportation Co. v. Pennsylvania Public Utility Commission*, 163 Pa. Superior Ct. 335. Even under the statutes which restrict review of the Public Utility Commission to "error of law

or lack of evidence" we find the courts not talking about "any" evidence or "some" evidence to support the findings of the Commission but of "sufficient" evidence. *Gannon v. Pennsylvania Public Utility Commission*, 162 Pa. Superior Ct. 88, 91. Surely no less is required by the instant statute which provides for appeal without restrictions. The Supreme Court has held that:

> ". . . The courts will not interfere with the exercise of an administrative duty by the officials entrusted therewith unless it is shown that the action taken has been arbitrary, capricious and unreasonable or clearly in violation of positive law." *Floersheim Appeal*, 348 Pa. 98,100. *Triolo v. Exley*, 358 Pa. 555, 558.

Surely this indicates very clearly that courts will interfere when the action of administrative officials is arbitrary, capricious, and unreasonable.

A finding unsupported by sufficient evidence is arbitrary, and unreasonable and no court, in a common law action, would allow a verdict of a jury so based to stand.

> ". . . since the opinion of Mr. Justice Stone, speaking for the Supreme Court of the United States in *National Labor Relations Board v. Columbian Enameling and Stamping Co.*, 306 U.S. 202 (1939) it has been generally recognized by the courts, including this court, that when a statute declares that the findings of fact of an administrative board, if supported by evidence, shall be conclusive, it means evidence that is substantial—that is, evidence affording a substantial basis of fact from which the fact in issue can reasonably be inferred. As was said by Mr. Justice Stone, 'Substantial evidence is more than a scintilla and must do more than create a suspicion of the existence of the fact to be established. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion', *Consolidated Edison Co. v. National Labor Relations Board*, supra,

(305 U.S. 197), p. 229, and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *Wilbert v. Commonwealth of Pennsylvania Second Injury Reserve Account et al.*, Appellants, 143 Pa. Superior Ct. 37, 49.

Moreover, the "substantial evidence" rule is applied to decisions of the Civil Service Commission of Pennsylvania. In *State Civil Service Commission v. Snyderman*, 362, Pa. 422, at page 424, Mr. Justice Stearne in speaking for the court said:

> "This Court must affirm the order of the court below unless it appears from the record that the adjudication of the Civil Service Commission is not supported by *substantial evidence*, or that constitutional rights of the appellant have been violated: Sec. 44 of the Administrative Agency Law, June 4, 1945, P.L. 1388, 71 P.S. 1710.44."

In *Pennsylvania Labor Relations Board v. Kaufmann Dept. Stores, Inc.*, 345 Pa. 398, 400-401, wherein Mr. Justice Horace Stern, speaking for the court, defined "substantial and legally credible evidence", as follows:

> "All orders and decrees of legal tribunals, including those of administrative boards and commissions, must be supported by evidence sufficient to convince a reasonable mind to a fair degree of certainty; otherwise our vaunted system of justice would rest upon nothing higher than arbitrary edicts of its administrators. 'Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion': *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 229. 'Substantial evidence is more than a scintilla, and must do more than

create a suspicion of the existence of the fact to be established': *National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300. 'The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power': *National Labor Relations Board v. Thompson Products, Inc.*, 97 Fed. 2d 13, 15; *National Labor Relations Board v. Union Pacific Stages, Inc.*, 99 Fed. 2d 153, 177; 'Suspicion may have its place, but certainly it cannot be substituted for evidence': *Union Trust Co. of Pittsburgh's Petition*, 342 Pa. 456, 464, 20 A. 2d 779, 782."

See also *Pennsylvania State Board of Medical Education and Licensure v. Schireson*, Appellant, 360 Pa. 129, 133.

As to the quantum of evidence required to satisfy the substantial test the following is pertinent.

"The companies contend that the Court of Appeals misconceived its power to review the findings and, instead of searching the record to see if they were sustained by "substantial" evidence, merely considered whether the record was "wholly barren of evidence" to support them. We agree that the statute, in providing that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive," means supported by substantial evidence. *Washington V. & M. Coach Co. v. National Labor Relations Board*, 301 U. S. 142, 107. Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Appalachian Electric Power Co. v. National Labor Relations Board*, 93 F. 2d 985, 989; *National Labor Relations Board v. Thompson Products*, 97 F. 2d 13, 15; *Ballston-Stillwater Co. v. National Labor Relations Board*, 98 F. 2d 758, 760.

> We do not think that the Court of Appeals intended to apply a different test. In saying that the record was not "wholly barren of evidence" to sustain the finding of discrimination, we think that the court referred to substantial evidence. *Ballston-Stillwater Co. v. National Labor Relations Board*, supra." *Consolidated Edison Co. et al. v. National Labor Relations Board et al.*, 305 U. S. 197, 229.

Turning to the Philadelphia City Charter we find that defendant's dismissal can be sustained only if it were for just cause. The Police Commissioner's power to discharge is so limited in Section 7-303 of the Philadelphia Home Rule Charter nor is this limitation an innovation with the City Charter. Legislation since 1885 has regulated the discharge of policemen. (See Act of June 1, 1885, P. L. 37, known as the Bullitt Bill).

In paragraph 5 of the Annotations, Section 7-201 of the City Charter, it is stated:

> "If the Commission has jurisdiction and the procedure upon appeal meets the requirements of due process and of the Charter, the Commission's action whatever it may be, provided it conforms to the Charter, is determinative of the case, and is final. There may be no further appeal in any event on the merits of the case."

It is difficult to see how it can be determined whether the Commission's action "conforms to the Charter", i.e., the dismissal was for just cause only, unless the evidence is reviewed. This review cannot be perfunctory or so drastically limited as to be in effect no review at all, for a consequence would be the sanctioning of arbitrary and illegal action, manifestly not intended.

It is to be noted that most of the decisions under prior civil service laws were in mandamus proceedings. Such a proceeding is different from an appeal in that it seeks

to *compel* a person or body clothed with judicial, deliberative or discretionary powers to revise or modify a decision resulting from the exercise of such discretion. See *Souder v. Philadelphia*, 305 Pa. 1, 8; also *Raffel v. Pittsburgh*, 340 Pa. 243, 246, and *Wagner v. Pittsburgh*, 352 Pa. 647, 649.

In mandamus proceedings, involving a review of the record only, the Court of Common Pleas was limited to a determination of whether there was substantial evidence and ascertaining that there had been no abuse of discretion by the Commission, (see *Gartland v. City of Philadelphia et al.*, 70 D. & C. 161, 163) but the review on appeal is broader.

Although what is just cause is a discretionary matter with the Commission, the Commission may not act without presentment of substantial evidence.

The court, in the *Gartland* case, supra, stated at page 164:

> "Thus the only question before this court is whether the commission has abused the discretion which has been granted to it. A definition of discretion by an administrative body was given by the late Judge Audenreid in The Lubin Manufacturing Company's appeal, 25 Dist. R. 578, 579 (1916), and it has been adopted in 18 C. J. 1134-1135, and by the late Judge Patterson speaking for the Court of Common Pleas No. 1, in L. J. Selznick Productions, Inc. v. Pennsylvania State Board of Censors, 26 Dist. R. 423 (1917) and by the late Judge Thompson speaking for the Orphans' Court of Philadelphia County in James' Estate, 9 D. & C. 639 (1927).
>
> "By discretion is meant the power to discriminate and determine what, under existing circumstances, is right and proper. The lawful exercise of discretion involves a fair consideration of all peculiar features of the particular question to the disposition of which it is to be applied. It excludes not only the play of

fancy or caprice, but also servile adherence to a hard and fast general rule."

In examining this case to determine whether the Civil Service Commission has abused its discretion we are reminded of the meaningful words of Mr. Justice Douglas, dissenting in *United States v. Wunderlich*, 342 U. S. 98, at 101:

> "Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered. At times it has been his property that has been invaded; at times, his privacy; at times, his liberty of movement; at times, his freedom of thought; at times, his life. Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions."

In the case at bar, the Commission had no proof, substantial or otherwise, that defendant received the garment in question. Defendant's name and address appeared on the store records, and that is the only connection between defendant and the garment. We cannot believe that a police officer, who would lower himself and his uniform as defendant was accused of having done, would no naively give his *true* name and address. Yet the Commission's findings rest on that single circumstance.

It was an abuse of discretion not to consider the testimony of Morris Oxman, the salesman involved, to the effect that he did not sell the garment to defendant. It was an abuse of discretion to decline to consider the case on the merits and to affirm the Commissioner simply on the ground that he is doing a good job and that the Commission felt it should not substitute its judgment for the Commissioner's judgment.

Even had the Commission considered the evidence proffered and reviewed the case on its merits, it would

have been an abuse of discretion to have sustained the Commissioner's finding, for there did not exist sufficient substantial evidence necessary to support such a finding.

In *Gartland v. City of Philadelphia et al.*, supra, proof that an officer, disciplined three times in twelve years, joined a felon for a cup of coffee, and accepted a ride from him, was not considered proof of consorting with a known criminal. The officer's discharge was determined to be an abuse of discretion and he was ordered reinstated.

In *Souder v. Philadelphia et al.*, 305 Pa. 1, the evidence was sufficient to sustain dismissal. There a captain of police when required to explain the source of bank balances several times in excess of his annual salary refused to do so. His answer to the grand jury confirmed his complicity in crime. To his superior he refused any answer. This was considered cause for discharge.

The specifications in both the *Gartland* and *Souder cases* were serious enough to warrant dismissal if proven. In the one instance, the charge was not proven without resort to conjecture, surmise, and imagination. These are no proper substitutes for evidence and the officer in question was reinstated. In the other instance the charge was proven by substantial evidence and the officer concerned was denied reinstatement.

The evidence introduced at the hearing and rehearing in the present proceeding did not prove a sale of a grey suit by Morris Oxman or anyone else to defendant Connolly. In fact it negated any such sale for Morris Oxman testified that he did not sell defendant any suit.

Analyzing the evidence further, assuming an action for the price of the suit by Diamond & Co. against defendant on the basis thereof, we would be required to direct a verdict for defendant. Further in any action by Diamond & Co. against George Tickner for the price of the suit on the basis of said testimony, we would be required to direct a verdict for the defendant. Also in a trial of George Tickner for appropriate crime by reason thereof, we would be required to direct a verdict of acquittal.

The evidence offered is legal proof of nothing. The grand jury did not indict on it; the district attorney did not prosecute on it; Diamond & Co. did not sue on it. It has no more probative value before the Civil Service Commission than before others. It does not prove that defendant purchased the suit in question and charged it to George Tickner.

The most that can be said for the evidence submitted is that the district *suspected* such a transaction and brought it to the Police Commissioner's attention.

A police officer must be protected and his position preserved against unfounded attack. No officer should be dismissed from service unless it is for *just cause*, not only charged but proven by substantial evidence. His position cannot be jeopardized by mere suspicious circumstances.

This court strongly believed that every member of the police force must be loyal and honest and dedicated to the enforcement of law and order. We are desirous of supporting the Police Commissioner to the fullest extent in his duty to provide the finest possible police protection for our citizens within the framework of the Home Rule Charter and the laws of Pennsylvania.

However, we are deeply impressed by the words of Chief Justice Kephart in *McCoach v. Philadelphia*, 273 Pa. 317, 330, although in a dissenting opinion for other reasons, wherein he characterized dismissal of a police officer as follows:

> "It is a serious matter for a man to be removed. . . . It involves many important considerations, and, because of the high character of an officer,—his long term of service, . . . making him a valuable public servant—merits a dignified treatment at the hands of those in authority, as the office is a responsible one."

Were suspicion alone sufficient cause to warrant the dismissal of a police officer, as we are urged to approve in this case, the efficiency of the department and the security

of every one of its officers in their respective positions would be jeopardized.

If we sustained the dismissal in the instant case it would create a precedent which might enable evilly disposed persons to deliberately involve good police officers in similar situations without their knowledge and cause their removal from the force.

Let us analyze the basis for dismissal of defendant from a slightly different approach. What was there to prevent George Tickner from sending a crony of his to Diamond & Co. with instructions to select a garment, identify himself as William Connolly, the police officer, and further implicate that police officer by giving an appropriate residential address and charging the same to George Tickner's account. Absolutely nothing. We suggest that the sworn disavowal of a police officer of long standing on the police force with numerous commendations for meritorious service and excellent reputation as testified to by former commanding officers, should carry equally great if not greater weight than that of an unproven sale. Conceivably the Police Commissioner himself might be the victim of such an indefinite standard of proof years hence. How could and would he disprove such a sale and purchase if it were attributed to him other than to disavow it as defendant did?

It would appear that neither the Police Commissioner nor the Civil Service Commission was willing to assume fully the responsibility attendant upon them in this case. The Police Commissioner referred the matter to a "trial board" in what he termed "in the interests of fairness". He adopted its recommendations as it applied to a group of officers. The Civil Service Commission in turn adopted the Police Commissioner's finding, subsequently stating that it did not want to substiute its judgment for that of the Commissioner. Thus the Commission adopted the "trial board's" recommendation not because it was convinced of

the proof of the charges presented but rather because of the expressed confidence in the manner in which the Police Commissioner has conducted his office.

It seems to us that fairness requires that defendant be protected against dismissal in the manner above described based upon what could be the machinations of suspicion. In our opinion the morale of the police force would be considerably enhanced with the assurance that its members' positions would be protected from possible attacks years hence based on unproven suspicion. With such confidence they could and would face and perform their duties fearlessly and effectively. This could not be so if their every act were performed with a reservation whether by so acting they might be implicated even remotely by suspicion. With full knowledge that their careers would be protected fully against every improper factor, that their careers could only be endangered by their own improper conduct, their actions would be motivated by their own best interests which would then be synonymous with the best interests of the City and its citizens.

After considering the matter carefully and at great length we conclude that the evidence is insufficient to support the findings of the majority of the Philadelphia Civil Service Commission, and that the action of the majority constitutes an abuse of discretion.

The appeal is sustained and defendant is reinstated to his status as a patrolman with the Department of Police, City of Philadelphia.

IN RE: GEORGE E. ADDISON, 385 Pa. 48 (1956)

Argued January 11, 1956. Before STERN, C. J. STEARNE, JONES, BELL, CHIDSEY, MUSMANNO and ARNOLD, *JJ.*

OPINION

April 16, 1956 CHARLES ALVIN JONES, *J.*

The principal question in this case is whether a general statute, which authorizes an appeal by an aggrieved employee from a decision of a civil service board of any city to the court of common pleas of the county, worked a nullification of the provision in Philadelphia's Home Rule Charter which restricts the scope of judicial review to be accorded by the court of common pleas upon an appeal thereto from a decision of the Civil Service Commission of Philadelphia.

On the present appellee's appeal to the court below from a decision of the Philadelphia Civil Service Commission, the court held that the general statute was paramount and, therewith, proceeded to a disposition of the appeal on the merits in disregard of the limitation upon court review imposed by the Philadelphia Home Rule Charter. A secondary question then followed as to whether the evidence adduced at the hearing before the Civil Service Commission was sufficient to warrant the employee's dismissal. The court deemed the evidence insufficient to justify the dismissal and entered an order sustaining the appeal. From that order, the City took this appeal.

The employee, George E. Addison, a patrolman of the City of Philadelphia, was dismissed by the Commissioner of Police for conduct unbecoming an officer in that he had accepted a mortgage loan of $2500 from one Leo "Clee" Coleman, a well-known "numbers banker." At the hearing before the Civil Service Commission on Addison's appeal of his dismissal, it was established beyond question that the $2500 loan was the full purchase price of a residence property bought by Addison at sheriff's sale; that the money so loaned was wholly supplied by Coleman; and that the mortgage which Addison and his wife executed to secure the loan named Leo Coleman as mortgagee and was for a ten-year term with interest at four per cent.

At the time of this occurrence and for upwards of four years prior thereto, Addison's area of police duty embraced 1632 North 13th Street, which was the location of "Clee" Coleman's "headquarters." Addison denied that he knew Leo Coleman personally at the time of the mortgage transaction but admitted that he had known of "Clee" Coleman, "the numbers banker," for many years. He claimed not to have thought of Leo Coleman, the mortgagee and lender of the purchase money, as being "Clee" Coleman. Addison further testified that the loan had been arranged for by one Abe Johnson, a real estate agent of the neighborhood, whose services Addison had enlisted before he bid in the property at sheriff's sale. Johnson was not only well acquainted with Addison but also with "Clee" Coleman, with whom he had had considerable business dealings. When Addison and his wife signed the mortgage, he read and noted that Leo Coleman was the mortgagee. He said that it was more than eighteen months after the mortgage had been placed that he first knew that the loan had come from "Clee" Coleman—a discovery which he did not communicate to anyone. About that time the mortgage was assigned to another lender. On the testimony so adduced at the hearing, the Civil Service Commission found Addison guilty of gross stupidity, if not culpable impropriety, in accepting a full purchase price mortgage loan on generous terms from one engaged in a "business" such as Coleman's, operating within Addison's bailiwick. The Commission accordingly concluded that Addison's dismissal by the Police Commissioner was for just cause.

Pursuant to the authority conferred by the Amendment of Article XV, Section 1, of our State Constitution, adopted November 7, 1922, the legislature, by Act of April 21, 1949, P. L. 665, 53 PS §3421 et seq., authorized cities of the first class to frame and adopt their own charters and to exercise powers and authority of local self-government subject to the restrictions, limitations and regulations prescribed by the Act. The presently material por-

tions of the enabling Act which specify the power and authority conferred and the limitations and restrictions imposed are as follows:

"Section 17. General Grant of Power and Authority. —Subject to the limitations hereinafter prescribed, the city taking advantage of this act . . . shall have and may exercise all powers and authority of local self-government and shall have complete powers of legislation and administration in relation to its municipal functions. . . . The charter of any city adopted or amended in accordance with this act may provide for a form or system of municipal government and for the exercise of any and all powers relating to its municipal functions . . . to the full extent that the General Assembly may legislate in reference thereto as to cities of the first class, and with like effect. . . .

"Section 18. Limitations. — . . . Notwithstanding the grant of powers contained in this act, no city shall exercise powers contrary to, or in limitation or enlargement of, powers granted by acts of the General Assembly which are . . . (b) Applicable in every part of the Commonwealth. (c) Applicable to all the cities of the Commonwealth."

The Charter Commission, which was created in accordance with the provisions of the enabling Act of 1949, cit. supra, framed a proposed Home Rule Charter for Philadelphia which was adopted by the electors of the City at a special election held on April 17, 1951. By its terms, the Charter was to become operative (except for a few items not presently material) on the first Monday of January, 1952.

Section 7-201 of the Charter, as so adopted, after conferring a right upon an aggrieved civil service employee of the City to appeal to the Civil Service Commission, ordained that "Findings and decisions of the Commission and any action taken in conformance therewith as a result thereof shall be final and there shall be no further appeal on the merits, but there may be an appeal to the courts on jurisdictional or procedural grounds."

By Act of September 29, 1951, P. L. 1654, 53 PS §304, entitled "An Act Providing for appeals from the decisions of civil service boards and commissions in cities," the legislature provided generally that "All decisions of the civil service board or commission in any city shall be subject to appeal to the court of common pleas or the county court of the county in which the city is located. The appeal may be taken, by any employee aggrieved thereby, at any time within thirty days after the decision has been entered of record."

Briefly stated, the specific question here involved is whether the scope of review by a common pleas court on an appeal from an order of the Civil Service Commission of Philadelphia is governed by Section 7-201 of the City's Home Rule Charter or by the Act of September 29, 1951, P. L. 1654. While this question was raised in *Civil Service Commission v. Wilson*, 373 Pa. 583, 586-587, 96 A. 2d 863, it was not there passed upon. Chief Justice Stern, who spoke for the court, expressly noting that "It is obviously unnecessary to determine that question since, in any event, the dismissal of Wilson's appeal by the court below must be affirmed even if the Act of Assembly were to be held controlling. . . ." And so, up to this time, the question has remained an open one in this court. The question of the legislature's power to modify the Philadelphia Home Rule Charter, which the appellee has interjected, is not here involved and will not, therefore, be considered.

The court below based its decision in this case on the reasoning of its opinion in *Philadelphia Civil Service Commission v. Connolly*, 1 D. & C. 2d 399, where it had held that the Act of 1951, supra, impliedly suspended the above-quoted provision of Section 7-201 of the Charter. The principal reasons assigned for the conclusions arrived at in the *Connolly* case, and the only ones raised on this appeal, are (1) that Philadelphia's Home Rule Charter was incapable of restricting the jurisdiction and power of the court of common pleas in respect of appeals thereto since the court

is not a municipal instrumentality and (2) that the Act of September 29, 1951, P. L. 1654, has State-wide applicability and, therefore, by virtue of the restriction contained in Section 18 of the enabling Act of 1949, supra, superseded Section 7-201 of the Charter.

Treating with these grounds in their reverse order, the Act of September 29, 1951, P. L. 1654, is not the type of general statute which Section 18 of the enabling Act of 1949, supra, intended should take precedence over any of the provisions of a Home Rule Charter formulated in accordance with the enabling Act.

In *Lennox v. Clark*, 372 Pa. 355, 378-379, 93 A. 2d 834, Mr. Chief Justice Stern, speaking for the court, said, "There seems to exist an erroneous impression on the part of the plaintiffs in all these actions regarding section 18 of the Home Rule Act which forbids the city [Philadelphia] to exercise powers contrary to powers granted by acts of the General Assembly applicable in every part of the Commonwealth or to all the cities of the Commonwealth. It is argued that because plaintiffs perform their respective functions and duties in pursuance of general laws which impose similar or identical duties upon officers holding corresponding positions throughout the Commonwealth, the city is thereby shorn of all power to interfere with them or their employees. Nothing could be further from the truth, it being abundantly clear that the limitations of power referred to in section 18 concern only laws in relation to substantive matters of State-wide concern, such as the health, safety, security and general welfare of all the inhabitants of the State, and not to matters affecting merely the *personnel* and *administration* of the offices local to Philadelphia and which are of no concern to citizens elsewhere. Any other conclusion would reduce the Charter to a mere scrap of paper and make the much heralded grant of Philadelphia home rule an illusion and a nullity."

The holding in the *Lennox* case, supra, is in accord with the uniform rulings on related questions by the courts of last resort of other States where municipal Home Rule

obtains. Thus, in *City of Portland v. Welch*, 154 Ore. 286, 299, 59 P. 2d 228, 233, the Supreme Court of Oregon said,—"The great majority of the home rule states have accepted the rule that general laws pertaining to purely municipal affairs as distinguished from state affairs—those in which the interests of the state dominate—do not supersede the charters or ordinances of municipalities in conflict therewith [citing cases]." Again, in *Goodwin v. Oklahoma City*, 199 Okla. 26, 182 P. 2d 762, 764, the Supreme Court of Oklahoma held that the provisions in a Home Rule Charter relating to the removal and discharge of appointed officers or employees are solely matters of municipal concern and are paramount to the general laws of the State on the subject. Other courts have likewise held that a provision in a Home Rule Charter governing the dismissal of municipal employees relates to a local matter and supersedes any conflicting general statutory provision notwithstanding that the statute is of general applicability. See, e.g., *City of Wewoka v. Rodman*, 172 Okla. 630, 631, 46 P. 2d 334, 335; and *State ex rel. Fischer v. City of Lincoln*, 137 Neb. 97, 102, 288 N. W. 499, 502.

What was held in the *Lennox* case, supra, is equally pertinent here. The administration of Philadelphia's civil service with reference to the removal or discharge of City employees is obviously not a matter of substantial Statewide interest but is one of purely local concern. It is beyond reasonable dispute that the subject does not affect the general welfare of the inhabitants of the State outside of Philadelphia. Consequently, the Charter provision prevails in the premises and not the general statute.

That brings us to the other of the two main grounds relied upon by the court below, namely, that the limitation upon the scope of court review of a decision by the Philadelphia Civil Service Commission is unconstitutional. The error in that conclusion is transparent. It stems from the fact that the court mistakenly conceived of the Home Rule Charter as being something less, in force and effect, than

a statute. Thus, the court opined that whatever else the Home Rule Charter is it is not a law enacted by the legislature. Of course, it was not enacted by the legislature. But, it emanated from the relevant provision of the State Constitution, implemented for appropriate execution by the enabling Act of 1949, and was duly adopted (i.e., enacted) by the affirmative vote of the electors of the City as the organic law of the corporate municipal body. That the Charter constituted legislation no less than does a statute of the legislature to like end is too plain for even cavil. Whether a municipal charter comes into being by direct statutory grant of the legislature or by adoption by the constituent electorate in the exercise of power constitutionally reposed, it is as much legislative in the one instance as in the other and has equal legal force and standing in both. Indeed, a constitutionally permissible adoption of a municipal charter by the electorate is not one whit less in dignity than a statute of the legislature granting a charter. Where it is adopted by a constitutionally empowered electorate, it affords an example of pure democracy—the sovereign people legislating directly and not by representatives in respect of the organization and administration of their local government. Specifically, therefore, Philadelphia's Home Rule Charter constitutes legislation (i.e., the adoption or enactment of a law by a competent body) just as much as did the City's Charter of 1919 which the legislature itself enacted. Wherefore, upon its due adoption, Philadelphia's Home Rule Charter took on the force and status of a legislative enactment. There is no special virtue in the word "legislative" merely because it stems from the same root as "legislature." It derives its qualifying meaning from the character of the thing done.

It follows that the limitation on court review of decisions of Philadelphia's Civil Service Commission, as provided for in Section 7-201 of the Charter, was competently and effectively enacted and was not an exertion of the

City's power to legislate concerning municipal affairs, as the learned court below erroneously assumed. In fact, the opinion for the lower court expressly conceded, as indeed it had to, that the legislature could have limited the scope of appellate review to the extent provided by Section 7-201 or the Charter and consonantly cited *Kaufman Construction Co. v. Holcomb*, 357 Pa. 514, 55 A. 2d 534. In that case our present Chief Justice, speaking with respect to the difference in court review where a statute or arbitration agreement makes no mention of any right of appeal and where it is provided that the order or decision of the adjudicating agency shall be final and no appeal allowed, aptly said,—"The distinction thus made has been reiterated and reinforced in a multitude of subsequent cases holding that where a statute expressly provides that there shall be no appeal the scope of appellate review is limited to the question of jurisdiction and the regularity of the proceedings; the merits of the controversy cannot be considered even though the interpretation given to the facts or the law by the governmental agency or the court below may have been erroneous." See the many cases cited in footnote 2 at p. 518 of the *Holcomb* case, supra.

The rule as to limited court review of dismissals of employees subject to civil service is the same under federal law. In *Levine v. Farley*, 107 F. 2d 186, 191, cert. den. 308 U. S. 622, it was said with respect to the dismissal of a Federal civil service employee,—"a court of law has no jurisdiction to inquire into the guilt or innocence of the employee as to the charges upon which he was removed." See, also, *Levy v. Woods*, 171 F. 2d 145, 146 (C. A. D. C.); and *Asher v. Forrestal*, 71 F. Supp. 470, 471. Likewise, dismissals of employees of the Commonwealth, subject to civil service, are accorded but a limited court review except for a dismissal made for ulterior reasons. In other words, the decisions of the State Civil Service Commission are ordinarily final and not reviewable on the merits by any court: Act of August 5, 1941, P. L. 752, Section 807, 71 PS §741.807.

The phrase "jurisdictional or procedural grounds" to which an appeal to the courts from a decision of the Civil Service Commission is restricted by Section 7-201 of the Charter needs on elucidation here. Its meaning and scope are well known in the law. See *Kaufman Construction Co. v. Holcomb*, supra, and cases there cited. Nor is any want of due process involved in such a limitation.

In the instant case neither a jurisdictional nor procedural question was raised or considered in the court below. And, no charge was made that the Charter and relevant regulations were not fully complied with or that the appellee did not have a full and fair hearing. On the contrary, the record discloses that he had due notice of the hearing before the Civil Service Commission, appeared there, was represented by counsel and testified in his own behalf. Such being the procedural situation, the learned court below plainly erred in not dismissing the appeal and in assuming to enter upon a disposition of the charge against the appellee on the merits.

The order of the court below is reversed and the decision of the Civil Service Commission reinstated at the cost of the City.

DISSENTING OPINION

April 16, 1956. JOHN C. BELL, JR., *J.*

The First Class City Home Rule Act of April 21, 1949, P. L. 665, authorizes cities to frame and adopt or amend their own charters and exercise all powers and authority of local self-government "subject to the limitations hereinafter prescribed." The limitations hereinafter prescribed are, inter alia:

"Section 18. . . . Notwithstanding the grant of powers contained in this Act, no city shall exercise powers *contrary to*,* or in limitation or enlargment of, *powers*

* Italics throughout, ours.

granted by acts of the General Assembly, which are—(a) applicable to a class or classes of cities on the following subjects: (9) . . . (b) Applicable in every part of the Commonwealth. (c) Applicable to all the cities of the Commonwealth."

It is crystal clear that that Act is directly applicable to and controls the instant case, and invalidates that part of the Charter which is in conflict with the Act of September 29, 1951, P. L. 1654, 53 PS §304.

The Act of September 29, 1951, supra, provides "all decisions of the Civil Service Board or Commission *in any city* shall be subject to appeal to the Court of Common Pleas. . . . The appeal may be taken by any employe aggrieved thereby, . . ." Could any language be clearer? That Act, by the clear language contained in its title and in its provisions, applies not to some cities, or to all cities except cities of the first class, or except to chartered cities—it applies to all cities.

That Act of the Legislature is by its clear terms and intent of State-wide application to *all* cities. It grants unquestionably to discharged civil service employes *a right of appeal* to the Courts. This right of appeal is not a mere matter of procedure or local concern—it is a matter of substance, a matter of State-wide concern, which the Legislature wisely said in the Act of 1951 applies to *all* cities. A right of appeal *to a Court* given to a policeman or other Civil Service employe who is discharged from his job for "just cause," by a civil service commission, is such a fundamental, substantive, American right that it is of State-wide concern, not only to the Legislature but to all of the people of Pennsylvania! As such, it is paramount to and invalidates any City Ordinance or City Charter which, as here, conflicts therewith.*

The decision of the majority flies directly in the teeth of the clear language of the Act of 1949! The majority

* It is unnecessary to decide whether this provision of the Charter violates the Constitution.

relies upon *Lennox v. Clark*, 372 Pa. 355, 93 A. 2d 834. That case was factually entirely different from the instant case, and as such is clearly distinguishable. If, however, we assume that the language of that opinion is applicable to the instant case, i.e., that subparagraphs (b) and (c) of the Act of 1949 limited the City of Philadelphia to *substantive* matters of State-wide concern, it does not support the majority opinion but strengthens and confirms this opinion. Moreover, the majority opinion is contrary to and in conflict with *Kelly v. Philadelphia*, 382 Pa. 459, 115 A. 2d 238. The Federal and out of state decisions cited in the majority opinion are not only not binding but also they are clearly distinguishable—in those cases there was no statutory or constitutional limitation of the rights of a city to local self-government such as exists in Pennsylvania.

The lower Court in discussing the merits, speaking through Judge Davis, said:

"Addison was discharged for purchasing his home entirely with monies furnished him by Leo 'Clee' Coleman, the well-known numbers banker.

"We have sustained his appeal for failure of proof of the essential element of the specification, viz., that Addison knowingly borrowed money from Leo Coleman, the notorious numbers banker.

"We have difficulty concluding from the record without gross speculation, that Addison received mortgage money from a person personally known to him at all, much less known to him to be a notorious numbers banker.

"The following factors militate against appellant's knowledge thereof. He pursued normal legitimate channels to purchase and pay for his home. He inquired of the real estate broker, Abe Johnson, whom he had known for years as a neighborhood realtor, as to the value and the amount of mortgage money he might anticipate obtaining. He engaged an attorney who bid, prepared the deed and mortgage, procured the actual funds, and handled the matter for him. Thereafter he paid monthly installments

thereon to the agents of the mortgagee and subsequent assignees.

"To purchase the property was his unquestionable right. To mortgage the property likewise was his right. To mortgage the property to a person named Leo Coleman was his right. Only to knowingly do so to Leo 'Clee' Coleman, the numbers banker, was not his right.

"There is no evidence in the record from which any responsible fact finding tribunal can conclude that Addison knew at the time that he executed the mortgage who the actual lender of the money was, much less that he knew him to be Clee Coleman, the numbers banker. See Gartland v. City of Philadelphia, 70 D. & C. 161.

"Suspicion was aroused by the fact that the amount of the mortgage equalled the bid to the sheriff. It would have been easy and better to have offered testimony from a qualified realtor that such a mortgage was inordinately large for the premises in question and not indicated as being warranted by its market value, if that was the case.

"Further suspicion was indulged in from the fact that Addison made only one numbers arrest in the several years while on duty in the area where Clee Coleman lived. How many arrests should he have made? How many arrests did others make? Both facts were susceptible of proof, if relevant, and not proven.

"We had occasion to review the kind of substantial proof necessary in Connolly case, supra. Suspicion is not enough.

"We have reviewed the record carefully and conclude that the Civil Service Commission acted on suspicion and not on substantive proof, for which reason we have sustained the appeal."

The evidence was sufficient to support the findings of the Court below; there was no error of law; and I cannot say that the trial Judge, who saw and heard the witnesses, and whose findings and conclusions were supported by the Court en banc, committed a manifest abuse of discretion. For these reasons, I would affirm the judgment of the Court below.

PETITION FOR RE-HEARING

TO THE HONORABLE, THE JUSTICES OF THE SAID COURT:

The petition of Samuel Gorson, Esquire, and Irving R. Shull, Esquire, respectfully pray your Honorable Court to grant a reargument of this appeal and in support thereof respectfully submits the following:

HISTORY OF THE CASE

George E. Addison, a member of the Philadelphia Police Force, was dismissed on a charge that he accepted certain favors from a known criminal. Thereafter, the Civil Service Commission of Philadelphia affirmed the dismissal. An appeal was taken to the Common Pleas Court of Philadelphia County, where the action of the Civil Service Commission was reversed and the City directed to return the appellee to his former position.

The City of Philadelphia then appealed this ruling to your Honorable Court. The basis of its appeal was Section 7-201 of the Philadelphia Home Rule Charter, limiting appeals to questions of jurisdiction and procedure only, and not to the merits.

On Monday, April 16, 1956, your Honorable Court sustained the appeal of the City of Philadelphia Wherefore, this petition for reargument for the following reasons:

I

Counsel for appellee respectfully avers that as the result of certain discussions which occurred during the presentation of the oral argument, certain vital issues other than those decided upon were not properly presented to the Court and were not, therefore, considered by this Honorable Court in its opinion, although set forth in the briefs.

A basic question involved and still left unanswered is whether or not the Act of September 29, 1951, having been passed after the adoption of the Home Rule Charter on April 17, 1951, did not repeal so much of the Charter as was repugnant thereto.

Although your Honorable Court stated that it considered the Home Rule Charter to have as much force upon the City in its municipal functions as any act of the Legislature, the Statutory Construction Act by its very terms would cause the later act to supersede the earlier act and, therefore, those provisions in the Home Rule Charter in conflict therewith.

This question was not considered in your opinion, although an integral part of the brief.

II

Although the facts are set forth in the opinion, no comment is made. In considering the entire case your Honorable Court recognized that the facts were before you. It is pointed out in your opinion that the Civil Service Commission found Addison guilty of "Gross Stupidity." However, this Court did not rule whether "Gross Stupidity" is sufficient grounds to sustain a dismissal. It is our posiiton that it is not.

III

Your Honorable Court was under a misapprehension as to the nature of the Home Rule Charter. Rather than being legislative in character, it is merely a set of regulations akin to the constitution and by-laws of a corporation, or any organization. The City was given the right to adopt its own constitution and by-laws by the House Rule Act of April 21, 1949, P.L. 665, 53 PS §3421, which is an act of Legislature. Certainly it cannot be contended that the Charter cannot be affected by subsequent acts of the Pennsylvania Legislature. This question was not passed upon or considered in the opinion.

IV

Your Honorable Court being the *Supreme* and highest Court of the Commonwealth has the right, as well as the duty, to consider in addition to legal questions presented to it, also the social and economic effects of legislation and all laws of this Commonwealth and the effect of such laws upon the citizens.

Although it is admitted that in State and Federal Civil Service there may be no appeals to the courts, such fact is not justification for its propriety. It is respectfully submitted that the present opinion, if permitted to stand, will remove the most effective safeguards placed upon Civil Service. The Civil Service Acts, being social legislation, effects every citizen in the community. The basic purpose of Civil Service is obviously to attract to the business of government, the best qualified workers and to afford them a feeling of stability, regardless of change of politics; thus, are they freed from the domination of the political leaders. Since the Civil Service Commissioners are appointees of the Mayor, who is elected, it is quite obvious that they may become subservient to the whims of the few, rather than the dictates of the many.

V

Your Honorable Court considered the question of whether the administration of the Philadelphia Civil Service is a matter of substantial statewide concern. It is respectfully urged that the principle duty of the Philadelphia Police Force is the enforcement of laws of statewide concern and that the status and well-being of these employees is of as much concern to the state as that of the police forces of the other sixty-six counties of the Commonwealth. It is respectfully urged that further consideration be given to the proposition that the rights and well-being of the Philadelphia Police Force should be placed on a par with that of the other police forces throughout Pennsylvania.

VI

In the recent case of Schultz et al. v. City of Philadelphia et al., January Term, 1956, nos. 221 and 222, reported in the Legal Intelligencer on April 23, 1956, your Honorable Court held:

> "The question arises, therefore, whether the municipality of Philadelphia possesses the power to enact this proposed measure, which, we have held, the Legislature of the Commonwealth itself cannot constitutionally enact. If the City does possess such power it can be only by virtue of the grant made to it by the Legislature of the right of self-government, since all powers of every municipality or political subdivision of the Commonwealth are solely derivative; a city is not a sovereign political entity but is strictly the creature of the Legislature."

The Act of April 21, 1951, P.L. 665, 53 PS §3421, which originally authorized the adoption by cities of the first class of their own charters, placed certain definite limitations, one of which is that no city shall exercise powers contrary to or in limitation of powers granted by acts of General Assembly which apply to all cities of the Commonwealth.

As set forth in the Schultz case the charters of cities are strictly creatures of the Legislature and it is only by a strained and tortured construction that the contents and limitations of the Act of 1949 can be said to have attempted to restrict privileges granted to all citizens of the Commonwealth of Pennsylvania.

As set forth by Justice Bell in his dissenting opinion:

> "That Act of the Legislature is by its clear terms and intent of State-wide application to *all* cities. It grants unquestionably to discharged Civil Service employees *a right of appeal* to the Courts."

The right that is granted by this Act of Legislature is such a basic fundamental right that it should only be abolished by the clearest of legislative intent.

It is respectfully urged that this point be reconsidered by your Honorable Court.

CONCLUSION

It therefore appears that your Honorable Court was in error in reversing the Court below for the reasons above stated.

WHEREFORE, your petitioners respectfully pray that your Honorable Court grant a reargument in this matter.

_____

_____

PETITIONERS

ORDER

April 30, 1956—Petition denied.

PER CURIAM

PETITION FOR RECONSIDERATION

TO THE HONORABLE, THE JUSTICES OF THE SAID COURT:

The petition of GEORGE E. ADDISON, by his counsel, J. J. KILIMNIK, ESQUIRE, respectfully represents:

1. That your petitioner, prior to March 26, 1954, was a policeman employed by the City of Philadelphia, having been appointed to this position after test and certification by the Civil Service Commission of the City of Philadelphia;

2. That on March 26, 1954, your petitioner was dismissed as a policeman of the City of Philadelphia by the Commissioner of Police;

3. That on September 14, 1954, the Philadelphia Civil Service Commission affirmed the decision of the Commissioner of Police;

4. That the dismissal of the petitioner was based on evidence of acts allegedly occurring in 1950, prior to the effective date of the Philadelphia Home Rule Charter;

5. That on November 10, 1955, the Court of Common Pleas No. 4, of Philadelphia County, sustained petitioner's appeal;

6. That on April 16, 1956, this Honorable Court reversed the decision of the Court of Common Pleas No. 4 and reinstated the decision of the Civil Service Commission;

7. That on April 30, 1956, this Honorable Court dismissed a petition for re-argument;

8. That one of the principal questions decided by this Honorable Court related to the applicability of the Act of September 29, 1951, P.L. 1654, 53 PS §304 to the Philadelphia Home Rule Charter, more particularly Section 7-201 of said Charter. The Act in question provided for an appeal by a civil service employee from the decision of a Civil Service Commission within 30 days thereof. Section 7-201 provided that findings and decisions of the Civil Service Commission were final and no further appeal on the merits was available but that an appeal could be made to the courts on jurisdictional or procedural grounds. This Court ruled that Section 7-201 of the Charter dealt with a local matter beyond the reach of the Act of 1951.

Another of the questions decided by this Honorable Court was the constitutionality of any provision of the Charter limiting the scope of court review of a decision

of the Philadelphia Civil Service Commission. This Court held that the Home Rule Charter constituted legislation although not specifically enacted by the legislature and was constitutional.

9. That the testimony before the Civil Service Commission reveals that the petitioner, when questioned by an assistant district attorney and two of his superior officers, prior to the hearing before the Civil Service Commission, was advised by the assistant district attorney, on the one hand, that he need not testify, and then advised that he had no constitutional rights and that he could not stand on his constitutional rights (p. 16a, 17a, 18a of the Record);

10. That the law member of the Civil Service Commission advised the petitioner at the hearing that the petitioner had the right to refuse to reply to any questions on the ground that the answers would tend to incriminate him, but that "it is the view of the Commission with respect to appellants that, if they do exercise that privilege, we dismiss the appeals by applying, either directly, or by analogy, the provision of the Charter which denies the right to employment by the City of those who fail to make full and frank disclosure, even though they have a constitutional right not to do so." (P. 20a, 21a of the Record);

11. That Section 10-110 of the Philadelphia Home Rule Charter, to which the Commission referred, reads as follows:

> "Refusal to Testify. If any officer or employee of the City shall wilfully refuse or fail to appear before any court, or before the Council or any committee thereof, or before any officer, department, board, commission or body authorized to conduct any hearing or inquiry, or having appeared, shall refuse to testify or to answer any question relating to the affairs or government of the City or the conduct of any City officer or employee on the ground that his testimony or answers would tend to incriminate him, or shall refuse to

waive immunity from prosecution on account of any matter about which he may be asked to testify before such court or at any such hearing or inquiry, he shall forfeit his office or position, and shall not be eigible thereafter for appointment to any position in the City service."

12. That said Section 10-110 of said Charter is similar to Section 903 of the Charter of the City of New York, which provides as follows:

"If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its teritorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency."

13. That the Supreme Court of the United States, on April 9, 1956, in *Slochower v. Board of Education of the City of New York*, 100 Supreme Court (L. Ed.) 449, held that the discharge of a college professor because of his refusal to testify before a Congressional Committee as to his membership in the Communist Party on the ground that it

would tend to incriminate him violated due process of law. In the course of its opinion, the Court said: (Page 452)

> "This appeal brings into question the constitutionality of #903 of the Charter of the City of New York. That section provides that whenever an employee of the city utilizes the privilege against self-incrimination to avoid answering a question relating to his official conduct, 'his term or tenure or office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency.' Appellant Slochower invoked the privilege against self-incrimination under the Fifth Amendment before an investigating committee of the United States Senate, and was summarily discharged from his position as associate professor at Brooklyn College, an institution maintained by the City of New York. He now claims that the charter provision, as applied to him, violates both the Due Process and Privileges and Immunities Clauses of the Fourteenth Amendment."

(Page 453) . . . "Slochower had 27 years' experience as a college teacher and was entitled to tenure under state law. McKinney's New York Laws, Education Law, #6206(2). Under this statute, appellant may be discharged only for cause, and after notice, hearing, and appeal #6206(10). The Court of Appeals of New York, however, has authoritatively interpreted #903 to mean that 'the assertion of the privilege against self-incrimination is equivalent to a resignation.' Daniman v. Board of Education, 306 NY 532, 538, 119 NE 2d 373. Dismissal under this provision is therefore automatic and there is no right to charges, notice, hearing, or opportunity to explain."

(Page 453) . . . "Slochower argues that #903 abridges a privilege or immunity of a citizen of the United States since it in effect imposes a penalty on the exercise of a federally guaranteed right in a federal proceeding. It also violates due process, he argues, because the mere claim of privilege under the Fifth Amendment does not provide a reasonable basis for the State to terminate his employment. Appellee insists that no question of 'privileges or immunities' was raised or passed on below, and therefore directs its argument solely to the proposition that #903 does not operate in an arbitrary or capricious manner. We do not decide whether a claim under the 'privileges or immunities' clause was considered below, since we conclude the summary dismissal of appellant in the circumstances of this case violates due process of law." (Pages 454-455): "At the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment. The right of an accused person to refuse to testify, which had been in England merely a rule of evidence, was so important to our forefathers that they raised it to the dignity of a constitutional enactment, and it has been recognized as 'one of the most valuable prerogatives of the citizen.' Brown v. Walker, 161 US 591, 610, 40 L ed 819, 825, 16 S Ct 644. We have reaffirmed our faith in this principle recently in Quinn v. United States, 349 US 155, 99 L ed 964, 75 S Ct 668. In Ullmann v. United States, —— US ——, 100 L ed (Advance P 361), 76 S Ct ——, decided this month, we scored the assumption that those who claim this privilege are either criminals or perjurers. The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. As we pointed out in Ullmann, a witness may have a reason-

able fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances. See Griswold, The Fifth Amendment Today (1955).

With this in mind, we consider the application of #903. As interpreted and applied by the state courts it operates to discharge every city employee who invokes the Fifth Amendment. In practical effect the questions asked are taken as confessed and made the basis of the discharge. No consideration is given to such factors as the subject matter of the questions, remoteness of the period to which they are directed, or justification for exercise of the privilege. It matters not whether the plea resulted from mistake, inadvertence or legal advice conscientiously given, whether wise or unwisely. The heavy hand of the statute falls alike on all who exercise their constitutional privilege, the full enjoyment of which every person is entitled to receive. Such action falls squarely within the prohibition of Wieman v. Updegraff, 344 U. S. 183, 97 L. ed. 216, 73 S. Ct. 215, supra."

14. That the assistant district attorney's advice to the petitioner that he had no constitutional right to refuse to make any statement to him and his superior officers, and the Commissioner's advice to the petitioner that he had the right to refuse to testify on the ground that the answers to any questions would tend to incriminate him, but that his refusal to so testify would result in his immediate dismissal (a statement concurred with by the assistant city solicitor at the hearing) were improper and violated due process of law;

15. That appropriate objection was made by then counsel for petitioner to any testimony by the petitioner but, apparently under the pressure of the threat to discharge the petitioner if he pleaded the protection of the

Fifth Amendment, succumbed to the threat and advised the petitioner to testify;

16. That the testimony thus given by the petitioner was under duress and was based on a mistaken conception of the validity and applicability of Section 10-110 of the Philadelphia Home Rule Charter;

17. That the dismissal of the petitioner was ordered on the basis of acts which occurred prior to the effective date of the Philadelphia Home Rule Charter when the petitioner, if dismissed, would have had the right to court review of the dismissal. The denial of court review on the merits, therefore, improperly gives retroactive effect to the Home Rule Charter and is a denial of due process of law;

18. That the denial of court review on the merits of petitioner's dismissal impaired the contractual obligation between the petitioner and the City in contravention to Article I, Section 10-1 of the Constitution of the United States, which prohibits an "ex post facto law, or law impairing the obligation of contracts";

19. That petitioner has obtained new counsel and desires an opportunity to present argument of the questions herein presented, which were not argued heretofore before this Honorable Court;

WHEREFORE, your petitioner respectfully prays this Honorable Court to reconsider its decision in said case on the questions raised in the within petition.

And he will ever pray, etc.

/s/ J. J. KILIMNIK,
Attorney for Petitioner.

ORDER

September 20th, 1956—PETITION DENIED

PER CURIAM

Appendix "B"

ACT OF APRIL 21, 1949, P. L. 665,

"Section 18. Limitations.

. . . Notwithstanding the grant of powers contained in this act, no city shall exercise powers contrary to, or in limitation or enlargement of, powers granted by Acts of the General Assembly which are

* * * * *

(b) Applicable in every part of the Commonwealth

(c) Applicable to all the cities of the Commonwealth"

ACT OF APRIL 21, 1949, P. L. 665,

Article II (General Grant of Powers; Limitations)

Section 17. General Grant of Power and Authority.

Subject to the limitations hereinafter prescribed, the city taking advantage of this act and framing and adopting or amending its charter thereunder shall have and may exercise all powers and authority of local self-government and shall have complete powers of legislation and administration in relation to its municipal functions, including the power and authority to prescribe the elective city officers, who shall be nominated and elected only in the manner provided by, and in accordance with, the provisions of the Pennsylvania Election Code and its amendments, for the nomination and election of municipal officers. The charter of any city adopted or amended in accordance with this act may provide for a form or system of municipal government and for the exercise of any and all powers relating to its municipal functions, not inconsistent with the Constitution of the United States or of this Common-

wealth, to the full extent that the General Assembly may legislate in reference thereto as to cities of the first class, and with like effect, and the city may enact ordinances, rules and regulations necessary and proper for carrying into execution the foregoing power and all other powers vested in the city by the charter it adopts or by this or any other law. Ordinances, rules and regulations adopted under the authority of this act or under the provisions of any charter adopted or amended hereunder shall be enforceable by the imposition of fines, forefeitures and penalties, not exceeding three hundred ($300.00) and by imprisonment for a period not exceeding ninety days.

MOTION FILED DEC 4 1956

IN THE

Supreme Court of the United States

No. 506

OCTOBER TERM, 1956

IN RE: GEORGE E. ADDISON, *Appellant*

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

Motion for Leave to File and Motion to Dismiss Appeal

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THE LEGAL INTELLIGENCER, 10 S. 37TH ST., PHILA. 4

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IN THE

Supreme Court of the United States

No. 506

OCTOBER TERM, 1956

IN RE: GEORGE E. ADDISON, *Appellant*

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

MOTION FOR LEAVE TO FILE

It is respectfully requested that the City of Philadelphia, appellee, be permitted to file the attached Motion to Dismiss Appeal, although the time for filing expired on or about November 15, 1956. Counsel for appellant has been consulted and has no objection to the filing of the Motion to Dismiss at this time.

Appellee urges that it is most important that the Motion to Dismiss be entertained because the federal questions which appellant raises in his appeal to this Court were not properly presented to, nor considered by the Supreme Court of Pennsylvania, nor are they substantial federal questions.

The failure to file the Motion within the normal period was due to inadvertence which resulted from the press of pending municipal problems of unusual magnitude and an exceptionally heavy appellate court list.

The Office of the Clerk of the Supreme Court of the United States and counsel for appellant were advised

within a day or two after the time for filing expired, of appellee's desire to file a Motion to Dismiss. It appears that no rights of appellant will be prejudiced by allowing the Motion to be filed.

Respectfully submitted,

JAMES L. STERN,
Deputy City Solicitor
DAVID BERGER,
City Solicitor
Attorneys for City of Philadelphia, Appellee.

MOTION TO DISMISS APPEAL

Appellee in the above entitled case moves this Honorable Court to dismiss the appeal on the grounds that there are no substantial federal questions sought to be reviewed and the alleged federal questions were not timely or properly raised, or passed upon in the Pennsylvania Supreme Court.

STATEMENT

Appellant relies on 28 U. S. C. §1257 (2) as the basis for this Court's jurisdiction of the present appeal from a decision of the Supreme Court of Pennsylvania. In its decision, the Pennsylvania Supreme Court held that the Philadelphia Home Rule Charter, rather than an act of the state legislature, controlled the scope of judicial review of an order of the Philadelphia Civil Service Commission.

Appellant, a former patrolman of the City of Phila-

delphia, was dismissed by the Commissioner of Police for conduct unbecoming an officer, in that he had accepted a mortgage loan of $2500 on unusually favorable terms from a well known "numbers banker", who operated in the area which was patrolled by appellant. On the basis of the testimony at a hearing before it, the Civil Service Commission found appellant guilty of gross stupidity, if not culpable impropriety, and his dismissal was upheld. He then appealed to the Common Pleas Court which reviewed the case on the merits, despite provisions of the Philadelphia Home Rule Charter which restricted the court's review to questions of jurisdiction and procedure. The City of Philadelphia appealed to the Supreme Court of Pennsylvania, which reversed the Common Pleas Court's decision on the ground that the Home Rule Charter governed the appeal proceedings, and not a state act relied upon by the Common Pleas Court. Subsequent to the decision of the appeal by the Pennsylvania Supreme Court, appellant filed successively a petition for rehearing and a petition for reconsideration. Both of these petitions were denied by the Pennsylvania Supreme Court without opinion.

ARGUMENT

I. No Federal Questions Were Presented Properly to Nor Considered by the State Supreme Court.

The federal questions upon which appellant relies, as the basis for the present appeal, were first raised in a so-called "petition for reconsideration" filed in the Pennsylvania Supreme Court. This petition for reconsideration, which was denied without opinion, was not filed until after:

(a) The Pennsylvania Supreme Court had rendered its decision in the appeal to it;

(b) A petition for re-hearing had been denied by the Pennsylvania Supreme Court;

(c) Notice of Appeal to the Supreme Court of the United States had been filed with the Pennsylvania Supreme Court.

It is indisputable that no federal question was ever properly presented to the Pennsylvania Supreme Court in this case. Mr. Justice Charles Alvin Jones, in his opinion for the Court, *Addison Case*, 385 Pa. 48, 54 (1956), expressly enumerated the questions raised in the appeal and they are patently questions of state law. Mr. Justice Jones stated:

> "The court below based its decision in this case on the reasoning of its opinion in *Philadelphia Civil Service Commission v. Connolly*, 1 D. & C. 2d 399, where it had held that the Act of 1951, supra, impliedly suspended the above-quoted provision of Section 7-201 of the Charter. The principal reasons assigned for the conclusions arrived at in the *Connolly* case, and the only ones raised on this appeal, are

(1) that Philadelphia's Home Rule Charter was incapable of restricting the jurisdiction and power of the court of common pleas in respect of appeals thereto since the court is not a municipal instrumentality and (2) that the Act of September 29, 1951, P. L. 1654, has State-wide applicability and, therefore, by virtue of the restriction contained in Section 18 of the enabling Act of 1949, supra, superseded Section 7-201 of the Charter."

Likewise, no federal questions were presented in the petition for re-hearing filed in the Pennsylvania Supreme Court. This is apparent from an examination of that petition, which is set forth on pages 63-67 of the Jurisdictional Statement. Indeed, appellant himself frankly admits in paragraph 19 of his petition for reconsideration, which is reprinted at page 74 of the Jurisdictional Statement, that he raised the constitutional questions on which he now relies for the first time in that petition. Paragraph 19 reads:

"That petitioner has obtained new counsel and desires an opportunity to present argument of the questions herein presented, *which were not argued heretofore before this Honorable Court*;" (Emphasis supplied.)

While the law of Pennsylvania is liberal in that it allows an appellee, as appellant was in the Pennsylvania Supreme Court, to raise constitutional questions for the first time at the appellate level, such questions cannot be raised after the state's highest court has rendered its decision. *Sherwood v. Elgart*, 383 Pa. 110 (1955); *In re Dorrance's Estate*, 172 A. 900 (Pa. Supreme Ct. 1933).[1] In

[1] Opinion omitted in official state reporter.

addition, the "petition for reconsideration" filed by appellant in the state court is a novel procedure in Pennsylvania practice. While the rules of the Pennsylvania Supreme Court permit the petition for re-argument initially filed in this case, there is no authority whatsoever for obtaining a rehearing in the Supreme Court by means of a "petition for reconsideration" or by any other kind of petition. Furthermore, this Court has repeatedly declared that an appeal to it cannot be sustained where the federal questions were first raised in the state appellate court, in a petition for a rehearing. See, for example, *McGarrity v. Delaware River Bridge Commission*, 292 U. S. 19 (1934); *Radio Station WOW v. Johnson*, 326 U. S. 120, 128 (1945); *American Surety Co. v. Baldwin*, 287 U. S. 156 (1932). In the instant matter, the federal questions were not raised until after a petition for rehearing had been denied.

Accordingly, the appeal should be dismissed for failure properly to present in the Supreme Court of Pennsylvania the federal questions upon which jurisdiction of this Court depends.

II. No Substantial Federal Question Is Involved in the Present Appeal.

On April 17, 1951, Philadelphia adopted a Home Rule Charter pursuant to a state constitutional provision. The Home Rule Charter provides that City employees may appeal a dismissal from employment to the Civil Service Commission. Any employee appealing to the Commission is entitled to a public hearing where he may present evidence. The Charter makes the findings and decisions of the Commission final, except that an appeal to the courts on jurisdictional or procedural grounds is allowed. Subse-

quent to the adoption of the Home Rule Charter, the Pennsylvania state legislature passed an act which, in effect, provided that the courts could review civil service commission orders on the merits as well as on jurisdictional and procedural grounds. In all of the court proceedings in this matter, it was appellant's sole contention that he was entitled to the benefits of this last mentioned state act. Thus, the only question involved, and the only one considered by the Supreme Court of Pennsylvania, was whether the scope of review of an order of the Philadelphia Civil Service Commission is governed by that City's Home Rule Charter, or by the subsequent act of the state legislature. Manifestly, such a determination involves no federal question, but entails only questions of state law. It is perfectly clear from the Pennsylvania Supreme Court's opinion that the only matter for decision was an interpretation of the extent of Home Rule powers under the law of Pennsylvania.

Appellant also contends that the Pennsylvania Supreme Court's decision that the Home Rule Charter provisions govern the scope of judicial review violates due process of law and impairs the obligation of an alleged contract between appellant and the City of Philadelphia. The basis for this contention is that at the time appellant committed the acts for which he was discharged (prior to the Home Rule Charter), he would have been entitled to a court review on the merits of the Civil Service Commission's order. Under the Home Rule Charter, as is the case in federal civil service,[2] court review of the Civil Service Commission is restricted to questions of jurisdiction and procedure.

The answers to appellant's contentions are (a) that

[2] Levine v. Farley, 107 F. 2d 186 (D. C. Cir. 1939).

the public hearing and judicial review provided for by the Home Rule Charter fully comport with the requirements of due process, and (b) that appellant as a public employee had no vested or contractual rights in the previously existing judicial procedures relating to the scope of review. Taking these points in inverse order, it is clear that legislation determining judicial procedures is no part of the employment relationship between the City and the appellant and is not within the scope of any alleged contract between them. Such a legislative provision relates primarily to the functions of the judicial branch of the government and is in the realm of legislative policy. It in no way constituted an express or implied term of appellant's employment with the City. The change in the scope of review effected by the Philadelphia Home Rule Charter is within the principle enunciated by this Court in *Dodge v. Board of Education*, 302 U. 7. 74, 78 (1937). In that case, where this Court held that a change of pension benefits of retired City employees was not an impairment of the obligation of a contract, Mr. Justice Roberts stated that ". . . legislation which merely declares a state policy and directs a subordinate body to carry it into effect is subject to revision or repeal in the discretion of the legislature" and such revision or repeal does not impair the obligation of a contract. This Court has repeatedly recognized the broad powers of a state to modify regulations relating to public employment. See, for example, *Higginbotham v. Baton Rouge*, 306 U. S. 535 (1938). Nevertheless, assuming, *arguendo*, that appellant had a right with respect to review of his dismissal from City employment that was entitled to protection, the minor change in the scope of review effected by the Philadelphia Home Rule Charter

would not constitute an impairment of such a right within the meaning of the Federal Constitution. The Philadelphia Home Rule Charter still allows a dismissed employee a full hearing before the Civil Service Commission and provides that the common pleas courts may review questions of procedure and jurisdiction. This Court has held that persons have no constitutional right to a particular form of remedy. *Neblett v. Carpenter*, 305 U. S. 297 (1939). A corollary to this constitutional principle, is the oft-decided rule that the legislature may modify, limit or alter the remedy for the enforcement of contractual obligations without violating the constitutional provision against state impairment of a contractual obligation. *Richmond Mortgage and Loan Corporation v. Wachovia Bank and Trust Company*, 300 U. S. 124 (1937).

Appellant's contention that he was denied due process is likewise without merit. The hearing afforded him before the Civil Service Commission fully satisfied the requirements of due process. Appellant had notice of the hearing, he appeared and was represented by eminent attorneys and presented witnesses in his own behalf. Neither before the Court of Common Pleas, nor the Supreme Court of Pennsylvania did he contend that the Civil Service Commission was without jurisdiction of his case, or that it failed to observe proper procedure.

Appellant attempts to rely, in this appeal, on the principle enunciated by this Court in *Slochower v. Board of Education of the City of New York*, 350 U. S. 551 (1956). In that case, this Court held that an employee of the City of New York could not be dismissed from his job, without a hearing, solely because he had invoked the privilege against self-incrimination while a witness before a United States Senate investigating committee. The *Slochower* decision is

totally inapposite to the present matter. Unlike the employee in *Slochower*, appellant in the instant case had a full and complete hearing before the Civil Service Commission. He expressly waived his privilege against self-incrimination after full consultation with his attorney. This is clear from the following quotation of testimony before the Civil Service Commission, which is not reprinted in the Jurisdictional Statement:

> "By MR. SCHOFIELD [one of appellant's counsel]: May I state to the Commission that I have advised this witness of his rights. I think I have done it thoroughly, and he is aware of it. He understands now what his rights are. He will testify and wants to testify. I think, therefore, you can proceed with his testimony if you so desire. . . ."

Appellant's testimony before the Civil Service Commission had a direct bearing on his conduct as a City policeman and was an appropriate and legitimate subject of inquiry by the Commission. The Civil Service Commission before which appellant testified was the Charter designated body to consider evidence relating to the fitness of a municipal employee. These facts present other features distinguishing the instant matter from the *Slochower* case, where the inquiry was conducted by a Senate sub-committee which frankly admitted that its investigation was not concerned with the affairs of New York City, the dismissed employee's employer. Thus, it is clear that the *Slochower* case has no relevance to the present appeal.

It is well-settled by the decisions of this Court that a city has a right to inquire of a municipal employee as to his past activities in order to determine the employee's

fitness to continue and remain in municipal employment. *Garner et al. v. Board of Public Works of Los Angeles*, 341 U. S. 716 (1951); *Adler et al. v. Board of Education of the City of N. Y.*, 342 U. S. 485 (1952). Accordingly, the fact that appellant may have been dismissed from the city service if he had refused to testify at the Civil Service Commission hearing, does not constitute a denial of his constitutional rights under the cited cases.

CONCLUSION

The City urges that since appellant failed to properly raise the federal questions on which the jurisdiction of this court depends, and since the federal questions which he raises are unsubstantial, his appeal should be dismissed.

Respectfully submitted,

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Deputy City Solicitor
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City Solicitor
Attorneys for City of Philadelphia, Appellee.

FILED
DEC 28 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

No. 506

OCTOBER TERM, 1956

IN RE: GEORGE E. ADDISON, *Appellant.*

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

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ARGUMENT

The appellee's motion to dismiss the appeal is based on two grounds: (1) that the alleged federal questions were not timely or properly raised or passed upon by the Pennsylvania Supreme Court, and (2) that there are no substantial federal questions sought to be reviewed.

In support of its first contention, appellee quotes from the opinion of the Pennsylvania Supreme Court (page 4, appellee's motion to dismiss appeal) as indicating the sole questions presented to that court. But it must be remembered that the appellee in this court was the appellant in the Pennsylvania Supreme Court. It could and did choose the grounds for its appeal. But as Justice Jones pointed out in the quoted section, the issues raised in the appeal

to the Pennsylvania Supreme Court in the instant case were "the *principal* reasons assigned for the conclusions arrived at in Connolly case." It did not exclude the *other reasons* assigned by the Court of Common Pleas for its decision in the *Connolly case* and made part of its decision in the instant case. These other reasons were: (1) the violation of due process of law (page 33, Jurisdictional Statement), (2) the impairment of the obligation of contract in contravention of the Federal Constitution (page 33, Jurisdictional Statement) and (3) the arbitrary and illegal action of the Civil Service Commission in its findings (pages 44, 45, 46, Jurisdictional Statement).

These reasons are an integral part of the record in this case. The fact that the appellee did not choose to appeal on those grounds should not deprive appellant from raising those other issues on appeal.

The Court of Common Pleas considered the question of the abuse of discretion by the Civil Service Commission amounting to caprice (pages 44, 45, 46, Jurisdictional Statement) because the Commission acted "without presentment of substantial evidence." The question of caprice was first raised by the appellant in his exception to the adjudication of the Civil Service Commission (see Appendix C), p. 11, infra).

What the Court said in *Bennett v. Dulles*, 117 F. Supp. 454, 456 (1954), an action involving the discharge of an employee from her civil service position in the State Department, is appropriate here. Said the Court: "There is no showing of arbitrary or capricious conduct and no statutory or constitutional rights are involved. Under these circumstances, the jurisdiction of the court comes to an

end, for 'it is fully established that if the prescribed procedure, if any, is followed *and no constitutional or statutory right is denied,* (Emphasis added) action of executive officers in discharging employees is not subject to revision in the courts' . . .".

In the instant case, there are statutory and constitutional rights involved. There is also a strong showing of arbitrary and capricious conduct on the part of the Civil Service Commission in its findings. This warrants review by the court. To hold otherwise would give the Civil Service Commission unprecedented and dictatorial powers not contemplated by the Philadelphia Home Rule Charter, contrary to the express provisions of the Act of 1951 by the State Legislature and violative of the federal constitutional rights of the appellant.

The appellee asserts (page 5, motion to dismiss appeal) that the Pennsylvania Supreme Court does not allow constitutional questions to be raised for the first time after the state's highest court has rendered its decision. The appellee cites two cases in support of this proposition, *Sherwood v. Elgart*, 383 Pa. 110 (1955) and *In re: Dorrance's Estate*, 172 A. 900 (Pa. Supreme Ct. 1933). However, an examination of the *Sherwood case* reveals that the Pennsylvania Supreme Court held just the opposite of what the appellee contends, saying (page 114):

> "In a supplemental brief filed prior to the reargument of these appeals, the appellees contend for the first time that the Act of 1913 is unconstitutional in that it violates Article I, §11 and Article III, §21 of the Constitution. Appellants contend this question cannot now be raised because of the general rule laid

> down in Montgomery County Bar Association v. Rinalducci, 329 Pa. 296, 298, 197 A. 924 and Smith v. Yellow Cab Co., 288 Pa. 85, 135 A. 858: ". . . matters not raised in, or considered by, the court below cannot be invoked on appeal even though they involve constitutional questions.' That is not applicable because it applies only to appellants. The rule here applicable is that a correct decision will be sustained if it can be sustained for any reason whatsoever; in other words, we will not reverse in such a case even though the reason given by the court below to sustain its decision was erroneous: Derry Council, No. 40 v. State Council, 197 Pa. 413, 42; Com. to use v. Wing, 253 Pa. 226, 230; Corgan v. Geo. F. Lee Coal Co., 218 Pa. 386, 392; Brew v. Hastings, 206 Pa. 155, 162; 2 R. C. L. 189; State H. for C.I. v. Consolidated W. S. Co., 267 Pa. 29, 39. It follows that the appellees may properly contend at this time that the Act of 1913 is unconstitutional. However, after considering appellees' contention we find it to be without merit."

In the *Dorrance Estate*, the court refused to consider a federal question first raised on appeal but gave the following reason:

> "As no federal question was involved or presented by the record or briefs or in the oral argument for consideration in the decision of the basic matter of fact, none was considered or decided and none remains for decision."

But in the instant case, the record clearly shows the federal questions in both the original record, Judge Davis' opinions and the petition for reconsideration.

The appellee further cites decisions in this court (page 6, motion to dismiss appeal) for the proposition that an appeal cannot be sustained where the federal questions were first made in the state appellate court in a petition for rehearing. However, an examination of these cases does not indicate any support for this proposition. In *McGarrity v. Delaware River Bridge Commission*, 292 U. S. 19 (1934), one of the cases cited, the court said as follows:

> "No federal question was raised prior to a petition for rehearing in the Supreme Court of the state, which was denied without more. Appellant insists that questions under the Fourteenth Amendment were thus raised at the first opportunity. The petition for rehearing does not appear in the record. No does the record contain the pleadings, the evidence, or any findings by the State Court upon the questions of fact involved. Appellant relies upon statements in the opinion of the State Court but these fail to support appellant's contentions."

This case obviously does not apply.

In *Radio Station WOW v. Johnson*, 326 U. S. 128, also cited by the appellee, the court held that the federal question had not only been eliminated by the pleadings but also denied the federal question on its merits. This case likewise is inapplicable.

In *American Surety Company v. Baldwin*, 287 U. S. 156 and 163, the same ground first presented to the state court as a matter of state law was subsequently presented as a matter of federal law. The court held that there had

been ample opportunity to present the question as a matter of federal law, saying further:

> "This is not a case where, as in Saunders v. Shaw, 244 U. S. 317, 320, the federal claim arose from an unanticipated disposition of the case at the close of the proceedings in the state Supreme Court . . . nor is the federal claim based . . . upon the unanticipated act of the state Supreme Court in giving to a statute a new construction which threatened rights under the Constitution."

In the instant case, there is ample support in the record of the federal questions asserted. Further, this Court's decision in *Slochower v. Board of Education of the City of New York*, 350 U. S. 551 (1956), was generally unanticipated.

Levine v. Farley, 107 F. 2d 186, cited by the appellee as indicating the federal restriction on the scope of judicial review is inapplicable to the instant case. In the *Levine case* there was no statutory conflict involved and there was no allegation of the violation of constitutional rights or of arbitrary and capricious conduct.

Dodge v. Board of Education, 302 U. S. 74, 78 (1937), cited by the appellee as authority for the scope of review effected by the Philadelphia Home Rule Charter is inapplicable. The *Dodge case* involved a decrease of annuity payments to retired teachers in the public schools of Chicago. The contention was made that the teachers had vested rights in annuities and that a contract had been created when the teachers remained in the service after passage of the Act. The court properly held that there was no im-

pairment of any contract since no contract had been created. It was held that the annuity payments were in effect pensions or gratuities involving no agreement of the parties and subject to modification or abolition at the pleasure of the legislature. This case is therefore inapplicable to the instant case because the appellee does not question that a contract between the appellant and the City as a policeman existed.

Recognizing this fact, the appellee argues that the change effected by the Philadelphia Home Rule Charter in restricting review to procedural questions only was a minor change only and that appellant has no constitutional right to a particular form of remedy. The cases cited by the appellant in support of this argument, *Higginbothom vs. Baton Rouge*, 306 U. S. 535 (1938), *Neblett v. Carpenter*, 305 U. S. 297 (1939), *Richmond Mortgage and Loan Corporation v. Wachovia Bank and Trust Co.*, 300 U. S. 124 (1937), are inapplicable. The *Higginbothom case* involved employment at the discretion of a city council who could appoint and remove at will. In the *Neblett case*, petitioners unsuccessfully claimed in the Supreme Court that the method of liquidation adopted by an Insurance Commissioner and approved by the Court denied them due process and impaired the obligation of their policy contracts. While saying in so many words that the petitioners had "no constitutional right to a particular form of remedy", the court also said the following:

> "They are not entitled, as against their fellows who prefer to come under the plan and accept its benefits, to force at their own wish and whim, a liquidation which under the findings will not advantage them and

may seriously injure those who accept the benefit of the plan. They are not bound, as were the dissenting creditors in Doty v. Love, 295 U. S. 64, to accept the application of the new company but are afforded an alternative whereby they will receive damages for breach of their contracts. They have failed to show that the plan takes their property without due process. "It is not contended that a statutory scheme for the liquidation of an insolvent domestic corporation is per se an impairment of the application of the company's contracts. The argument is that the impairment of contract arises from the less favorable terms and conditions of the new noncancelable policies which are to be substituted for the old ones and, in the case of the life policies, by the substitution of a new company as contractor in place of the old, without the consent of the policy-holder. This position is bottomed upon the theory that the policy-holders are compelled to accept the new company as insurer on the terms set out in the rehabilitation agreement. As has been pointed out they are not so compelled and are given the option of a liquidation which on this record appears as favorable to them as that which would result from the sale of the assets and pro rata distribution in solution of all resulting claims for breach of outstanding policies."

The appellee has, therefore, quoted the phraseology of the Court out of context.

With respect to the effect of the *Slochower case*, the appellee quotes appellant's then counsel as stating to the Civil Service Commission that he advised the appellant of his rights and that appellant wanted to testify (page 10,

motion to dismiss appeal). The statement of counsel must be taken in the light of the prevailing view as to the effectiveness of the provision of the Home Rule Charter restricting the scope of review and by the threat of dismissal for the exercise of appellant's right to claim the privilege of the Fifth Amendment as is set forth in the record. It must also be remembered that this occurred prior to the decision of this Court in the *Slochower case*. Counsel appeared to have no alternative.

The decision of the Civil Service Commission was based on pure suspicion and had no bearing on appellant's conduct as a city policeman. The Commission's findings amounted to arbitrary and capricious conduct such as to warrant review by a court of competent jurisdiction. *Bennett v. Dulles*, supra.

Finally, the cases of *Garner v. Board of Public Works of Los Angeles*, 341 U. S. 716 (1951) and *Adler v. Board of Education of the City of New York*, 342 U. S. 485 (1952) cited by the appellee on page 11 of its motion to dismiss appeal, are inapplicable. In the first place, these cases involved membership in subversive organizations, proof of which was sufficient to disqualify the parties involved from their teaching posts. Secondly, full judicial review was provided in the cases in question which, of course, is not the case with the provision in the Philadelphia Home Rule Charter as interpreted by the Pennsylvania Supreme Court.

Appellant does not question the right of the Commission to inquire into the fitness of the appellant to continue and remain in municipal employment. Appellant, however, is entitled to a fair hearing and not one where his basic

constitutional rights are flagrantly ignored in a capricious and arbitrary manner. Appellant is also entitled to the protection of his contract with the City as a police officer so that his employment should not be subject to the whim and caprice of a superior official. These rights apply to all city employees of the City of Philadelphia and not merely to the appellant.

The appellant has adequately shown that substantial federal questions exist and were timely raised. None of the cases cited by the appellee support its contentions to the contrary.

WHEREFORE, appellant urges this Court to deny the motion to dismiss the appeal.

Respectfully submitted,

J. J. KILIMNIK,
Attorney for Appellant.

APPENDIX "C"

EXCEPTIONS TO ADJUDICATION

George E. Addison, appellant, hereby assigns the following exceptions to the adjudication of the Civil Service Commission rendered in the above entitled matter:

1. The Civil Service Commission (hereinafter referred to as Commission) erred in affirming the action of the Police Commissioner in dismissing appellant from his position as policeman in the Police Department of the City of Philadelphia. The order of the Commission is as follows: ". . . we, therefore, sustain the dismissal and we so certify to the Personnel Director."

2. The Commission erred in making findings of fact, there being no evidence in the record to furnish a basis for those findings.

3. Assuming arguendo the findings of fact by the Commission were not in error, the Commission erred in determining that those facts were sufficient upon which to support the charge against the appellant of "conduct unbecoming an officer", such evidence being insufficient to support that charge as a matter of law.

4. The Commission erred in making findings of fact and conclusions based upon hypothesis and conjecture.

5. The Commission erred in making findings of fact and determinations based upon their conclusions as to certain facts of which there was no evidence in the record,

the Commission apparently drawing upon their own knowledge and belief.

6. The Commission abused its discretion and was capricious in finding as a fact, in the face of overwhelming evidence, that the appellant was aware that Leo Coleman was synonymous with the allegedly notorious "Clee" Coleman.

7. The Commission was procedurally incorrect in permitting the Assistant City Solicitor to inflame their judgment by referring to the arrest and conviction of "Clee" Coleman in the face of the fact that the appellant was unaware of the dual identity of Coleman, his original mortgagee.

8. The Commission committed a basic error in procedure by permitting the Assistant City Solicitor to attempt to prove his charges by calling the appellant as his witness over the objections of appellant's counsel.

9. The Commission was guilty of an abuse of discretion in its finding that the appellant knew Leo Coleman as a "notorious number banker" in the appellant's police district.

10. The Commission erred, as a matter of law, in deciding that a police officer may be dismissed for "gross stupidity".

11. The Commission committed a basic error in deciding that a loan, not matter how generous, that has been and is being painstakingly repaid with interest, is an event of such a suspicious nature as to require investigation by a scrupulously honest police officer.

LEMUEL B. SCHOFIELD
SAMUEL GORSON
Attorneys for Appellant

JANUARY 14, 1957.

Decisions Per Curiam.

No. 506. IN RE ADDISON. Appeal from the Supreme Court of Pennsylvania, Eastern District. *Per Curiam:* The motion for leave to file and the motion to dismiss are granted. The appeal is dismissed for want of a substantial federal question. *Jacob J. Kilimnik* for appellant. *David Berger* for the City of Philadelphia, appellee. Reported below: 385 Pa. 48, 122 A. 2d 272.